TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted] 290

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EVA ROBERTS COLE, AS ADMINISTRATRIX OF THE ESTATE OF A. W. ROBERTS, DECEASED, FOR HERSELF, SARAH F. ROBERTS, CLAUDE ROBERTS, AND BARNUM ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED FEBRUARY 11, 1920.

(29,290)

(26,929)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 843.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EVA ROBERTS COLE, AS ADMINISTRATRIX OF THE ESTATE OF A. W. ROBERTS, DECEASED, FOR HERSELF, SARAH F. ROBERTS, CLAUDE ROBERTS, AND BARNUM ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

	Original.	Print.
Return to writ of error	1	1
Citation and service	2	2
Petition for writ of error	4	2
Assignment of errors	10	5
Order granting petition for writ of error	13	7
Writ of error	15	8
Bond on writ of error	18	9
Petition in error	19	11
Case-made	21	12
Index to case-made	22	12
Petition	24	14
Answer	30	17
Reply	33	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 2, 1919.

	Original.	Print.
Deposition of Frank Swayze	35	19
Picture	45	24
Testimony of Mrs. E. L. Tremblay	49	26
Fred Fesler	53	28
M. A. West	64	33
J. A. Malone	72	37
Agreement of facts, offers of evidence, &c	82	42
Plaintiff's Exhibit B—Ordinance No. 1739, regulating speed of steam railways, &c	84	43
Testimony of Mrs. A. W. Roberts	86	44
Mrs. Eva Cole	91	47
Claude Roberts	96	49
C. O. Cole	104	53
C. F. Semmelbeck	105	53
Mrs. Eva Cole (recalled)	106	54
Defendant's Exhibit 1—Blue-print	108	54
Testimony of E. E. Yates	109	55
J. J. Bergoyle	149	74
R. B. Howard	169	83
Patrick Quinn	179	88
Plaintiff's Exhibit C—Photograph	191	94
Defendant's Exhibits 2, 3, 4, 5 and 6—Photographs	193	95
Testimony of Harold Cochran	198	96
A. Sparks	210	101
A. T. Stroud	217	104
Alice M. Reed	229	110
Cora Avertt	235	112
Mrs. A. B. Jones	242	116
Bert New	245	117
R. B. Cook	251	120
Harold Cochran	254	121
Motion to direct verdict	261	125
Reporter's certificate	263	125
Plaintiff's requested instructions	265	126
Defendant's requested instructions	269	128
Instructions to jury	273	131
Verdict	282	136
Motion for new trial	284	136
Judgment	287	138
Order overruling motion for new trial	290	140
Orders extending time, &c	293	141
Notice and service of case-made	297	143
Waiver of suggestion of amendments	298	143
Waiver of service	299	144
Judge's certificate to case-made	300	144
Waiver of summons	301	145
Petition for substitution as plaintiff in error	303	146
Order of substitution, &c	306	147
Order of argument and submission	307	147
Judgment	308	148
Opinion, Pope, C.	309	148
Clerk's certificate	313	150

1 *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this 22nd day of January, 1919.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By N. C. ORR, *Assistant.*

2 Filed in Supreme Court of Oklahoma Jan. 23, 1919. William M. Franklin, Clerk.

In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

v.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, deceased, for herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein The Chicago, Rock Island and Pacific Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma, this 23 day of January, 1919.

SUMMERS HARDY,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma,

By N. C. ORR.

We, the undersigned, attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

January 23, 1919.

LEDBETTER, STUART & BELL,
Attorneys for Eva Roberts Cole, as Admx. of the Estate of A. W. Roberts, for Herself et al.

3 [Endorsed:] No. —. In the Supreme Court of the United States. The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, v. Eva Roberts Cole, Admx. of the Estate of A. W. Roberts, deceased, for herself, et al., Defendant in Error. Citation.

4 Filed in Supreme Court of Oklahoma Jan. 6, 1919. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 8758.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EVA ROBERTS COLE, as Administratrix of the Estate of A. W. Roberts, Deceased, for Herself and Sarah F. Roberts, Claud Roberts, and Barnum Roberts, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma.

To the Honorable J. F. Sharp, Chief Justice of the Supreme Court of the State of Oklahoma:

The petition of The Chicago, Rock Island and Pacific Railway Company, by C. O. Blake and R. J. Roberts, its attorneys, hereby sets forth:

That on the 24th day of December, 1918, the Supreme Court of the State of Oklahoma made and entered its final order and judgment herein in favor of Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, deceased, and for herself and others, in which final order and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the petitioner, all of which are more fully shown as follows:

That heretofore, to wit, on the 17th day of May, 1916, there was tried in the District Court of Oklahoma County, in said State, a case in which Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, suing for herself, Sarah F. Roberts, Claud Roberts and Barnum Roberts, was plaintiff, and Jacob M. Dickinson, as receiver of The Chicago, Rock Island and Pacific Railway Company, was defendant. The complaint in said cause was a petition for the recovery of damages, by reason of the death of the decedent and father and husband of the plaintiffs, alleged to have been sustained by Eva Roberts Cole and the others for whom she sued, which death was therein alleged to have been caused by the negligent operation of one of defendant's trains. The defendant answered in said cause, putting in issue the plaintiff's allegations of negligence and charging that said A. W. Roberts had negligently contributed to the cause of his death by failing to use proper care and prudence in attempting to cross the railway tracks.

Upon the trial of the cause it was shown that A. W. Roberts, while trespassing in the day time and in the full possession of the natural faculties of mind, sight and hearing stepped in front of a moving train of which his view was unobstructed and was struck and killed thereby.

After the introduction of all of the evidence, the Receiver moved the court to direct the jury to return a verdict for the said defendant for the reason that the proof showed that the negligence of A. W. Roberts had contributed to the cause of his death, which request was refused by the court, which then submitted said cause to the jury under instructions leaving the question of contributory negligence to the jury, and the defendant receiver then excepted to the refusal to direct a verdict and to the submission of the question of contributory negligence to the jury. A verdict was returned for the plaintiff, whereupon the Receiver defendant moved the court to grant him a new trial, assigning as grounds therefor that the verdict was not sustained by sufficient evidence; that the verdict was contrary to law; that the trial court had committed errors of law at the trial, to which said defendant excepted and expressly setting forth that by reason of the failure of the court to instruct the jury to return a verdict in defendant's favor because of the contributory negligence of the plaintiff, the defendant is denied due process of law and the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States and the statutes of the United States made in accordance therewith. That

the said motion for new trial was overruled and the defendant receiver excepted and thereupon there was a judgment for the plaintiff.

The motion for a directed verdict and the motion for a new trial, upon the grounds hereinbefore set out, present a Federal question in said case, viz.: Sec. 6, of Art. 23 of the Constitution of the State of Oklahoma, providing that "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." and the action of the court in giving effect to said provision of the Constitution of the State of Oklahoma *were* repugnant to the Fourteenth Amendment to the Constitution of the United States by denying to the Receiver defendant the equal protection of the laws and depriving him, as such, of property without due process of law.

That the Receiver defendant presented said questions to the Supreme Court of the State of Oklahoma by petition and summons in error and said Supreme Court of the State of Oklahoma, on the 24th day of December, 1918, rendered its final judgment affirming the decision and judgment of the trial court.

That prior to the decision of said cause in the Supreme Court of the State of Oklahoma, the said court, upon application and showing of interest, entered an order permitting this petitioner to prosecute said proceeding in error.

Petitioner further shows that the said judgment of said Supreme Court was and is a final judgment of the highest court of said state,
in which a decision in said cause may be had; that said Su-
7 preme Court of the State of Oklahoma, in affirming the said judgment, held that:

"Were it not for Art. 23, Sec. 6, of the State Constitution which provides that:—'the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury,' it would be necessary to hold as a matter of law that the negligence of plaintiff precludes a recovery."

and further held that the said Sec. 6 of Art. 23 of the Constitution of the State of Oklahoma made the question of contributory negligence one to be left at all times to the jury and that Sec. 6 of Art. 23 of the Oklahoma constitution was not repugnant to the Fourteenth Amendment to the Constitution of the United States.

The petitioner further shows that a Feneral question was made in said cause, as herein set out, and said judgment of said Supreme Court was repugnant to the Fourteenth Amendment to the Constitution of the United States, in that it gave effect to the arbitrary determination of the jury, upon the erroneous theory that, consistently with said amendment to the Constitution of the United States, questions of law had, by said Sec. 6 of Art. 23 of the Oklahoma constitution, been converted into questions of fact and the decision of said Federal question was necessary to the judgment rendered.

The jury, by reason of said question being left to them as a question of fact, exercised an authority repugnant to the Fourteenth Amendment to the Federal constitution, in that the said jury was

without judicial power except for the determination of questions of fact.

Wherefore, petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to this court; for such other and further process as will enable your petitioner to obtain a review of the case, and a correction of the said error by the said
8 Supreme Court of the United States, and also that an order be made fixing the amount of security which said plaintiff in error shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

C. O. BLAKE,
R. J. ROBERTS,
JOHN E. DU MARS,
Attorneys for The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Eror.

9 [Endorsed:] Case No. 8758. In the Supreme Court of the State of Oklahoma. The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, vs. Eva Roberts Cole, as Admx. of the Estate of A. W. Roberts, deceased, for herself and Sarah F. Roberts, Claud Roberts and Barnum Roberts, Defendant in Error. Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma.

10 Filed in Supreme Court of Oklahoma Jan. 6, 1919. William M. Franklin, Clerk.

In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself and Sarah F. Roberts, Claud Roberts, and Barnum Roberts, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Oklahoma erred, to the grievous injury and wrong of the plaintiff in error herein and to the prejudice and against the substantial rights of the plaintiff in error herein, in the following particulars, to wit:

1. The Supreme Court of the State of Oklahoma erred in affirm-

ing the judgment of the District Court of Oklahona County, Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in refusing to pass upon the question of contributory negligence as a question of law arising upon the facts shown in evidence.

3. The Supreme Court of the State of Oklahoma erred in holding that Sec. 6 of Art. 23 of the Constitution of the State of Oklahoma, providing:

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

is not repugnant to the Fourteenth Amendment to the Constitution of the United States, in denying the equal protection of the laws.

4. The Supreme Court of the State of Oklahoma erred in holding that the effects of the judgment and proceedings of the District Court of Oklahoma County, Oklahoma, were not to deprive the plaintiff in error of its money and property without due process of law.

5. The Supreme Court of the State of Oklahoma erred in holding that the judgment and proceedings did not have the effect to deny to the plaintiff in error the equal protection of the laws.

6. The Supreme Court of the State of Oklahoma erred in holding that the question of contributory negligence was, by reason of the provisions of Sec. 6 of Art. 23 of the Constitution of the State of Oklahoma, a question of fact only.

11 7. The Supreme Court of the State of Oklahoma erred in giving effect to Sec. 6 of Art. 23 of the Constitution of the State of Oklahoma.

For these and other manifest errors appearing in the record, the said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, prays that the judgment of said Supreme Court of the State of Oklahoma be reversed, set aside and held for naught and that judgment be rendered for plaintiff in error, granting it its rights under the Constitution and laws of the United States, and plaintiff in error also prays judgment for its costs.

C. O. BLAKE.
R. J. ROBERTS.
JOHN E. DU MARS.
Attorneys for The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error.

12 [Endorsed:] No. —. In the Supreme Court of the United States. The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, vs. Eva Roberts Cole, Admx. of the Estate of A. W. Roberts, deceased, for herself, et al. Assignment of Errors.

13 Filed in Supreme Court of Oklahoma Jan. 6, 1919. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 8758.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself and Sarah F. Roberts, Claud Roberts, and Barnum Roberts, Defendants in Error.

Order Granting Writ of Error from the Supreme Court of the United States.

Upon reading the petition and assignments of error of The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, praying for the allowance of a writ of error from the Supreme Court of the United States to this court to reverse the judgment of this court heretofore rendered on the 24th day of December, A. D. 1918, and it appearing from said petition and the record in this cause that a proper cause for the allowance of said writ is presented, it is ordered that the same be, and is hereby, allowed.

It is further considered, ordered and adjudged that the sum and amount of security which the said plaintiff in error shall give and furnish upon said writ of error be, and hereby is, fixed at $1500.00 and that said security shall be by bond conditioned according to law and with sureties to be approved by the Chief Justice of the Supreme Court of the State of Oklahoma and upon the giving and approval of such bond all further proceedings in this court be suspended and stayed until the determination of said writ of error in the Supreme Court of the United States.

Done this 6th day of January, 1919.

[Seal Supreme Court, State of Oklahoma.]

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
WM. M. FRANKLIN,
By NEAL ORR, *Asst.*

14 [Endorsed:] Case No. 8758. In the Supreme Court of the State of Oklahoma. The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, vs. Eva Roberts Cole, Admx. of the estate of A. W. Roberts, deceased for herself and Sarah F. Roberts,

Claud Roberts and Barnum Roberts, Defendant in Error. Order Granting Writ of Error from the Supreme Court of the United States.

15 Filed in Supreme Court of Oklahoma Jan. 17, 1919. William M. Franklin, Clerk.

In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself and Sarah F. Roberts, Claud Roberts, and Barnum Roberts, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Oklahoma, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Chicago, Rock Island and Pacific Railway Company and Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, deceased, for herself and Sarah F. Roberts, Claud Roberts and Barnum Roberts, wherein was drawn in question the validity of a provision of the Constitution of, and of an authority exercised under, the said state, on the ground of their being repugnant to the Constitution, treaties and laws of the United States, and the decision was in favor of the validity of the said constitutional provision of, and authority exercised under, said state, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision upheld the said constitutional provision of, and authority under, said state and denied the construction of the Constitution of the United States contended — by

16 the plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 5th day of February, 1919, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the

said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. E. D. White, Chief Justice of the said Supreme Court, the 6th day of January, in the year of our Lord one thousand nine hundred and nineteen.

[Seal District Court of the United States, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma.

Writ of Error Approved.
J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest.

[Seal Supreme Court, State of Oklahoma.]

WM. FRANKLIN, *Clerk,*
By NEAL ORR, *Asst.*

17 [Endorsed:] No. —. In the Supreme Court of the United States. The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, v. Eva Roberts Cole, Admx., of the Estate of A. W. Roberts, deceased, for herself and Sarah F. Roberts, Claud Roberts and Barnum Roberts, Defendant in Error. Writ of Error.

18 Filed in Supreme Court of Oklahoma Jan. 17, 1919. William M. Franklin, Clerk.

(Copy.)

In the Supreme Court of the State of Oklahoma.

No. 8758.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

v.

EVA ROBERTS COLE, as Administratrix of the Estate of A. W. Roberts, Deceased, for Herself and Sarah F. Roberts, Claud Roberts, and Barnum Roberts, Defendant in Error.

Bond.

Know all men by these presents that we, The Chicago, Rock Island and Pacific Railway Company, a corporation, as principal, and

American Surety Company of New York, as surety, are held and firmly bound unto Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, deceased, for herself and Sarah F. Roberts, Claud Roberts and Barnum Roberts, in the sum of one thousand and five hundred dollars ($1,500.00), to be paid to the said obligee, her heirs, successors and assigns; to the payment of which, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of January, A. D. 1919.

Whereas the above-named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above-mentioned plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Principal,

By C. O. BLAKE &
R. J. ROBERTS,
Its Attorneys.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By HERMAN J. ROLEKE,
Resident Vice President.

Attest:
M. FAGAN,
Resident Assistant Secretary.

25972 A.

Bond Approved:
SUMMERS HARDY,
Chief Justice of the Supreme Court of the State of Oklahoma.

19 Filed in Supreme Court of Oklahoma Nov. 18, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 8758.

JACOB M. DICKINSON, Receiver Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error,

vs.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Defendant in Error.

Petition in Error.

Said Jacob M. Dickinson, as receiver for The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, alleges and shows to the court that at all times hereinafter mentioned, he was, and now is the sole receiver for the said The Chicago, Rock Island and Pacific Railway Company, a corporation organized and existing according to law, under and by virtue of the laws of the States of Illinois and Iowa, with his principal place of business in the City of Chicago, in said State of Illinois, with a line of railway running into and through the State of Oklahoma, and that on the 20th day of May, 1916, Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, deceased, for herself and Sarah F. Roberts, Claude Roberts and Barnum Roberts, obtained a verdict against the said plaintiff in error in the District Court of Oklahoma County, State of Oklahoma, by the consideration of the court, upon which a judgment was entered for the sum of one thousand dollars ($1,000.00) against the plaintiff in error in a certain action then pending in the said District Court, wherein said plaintiff in error was defendant and said defendant in error was plaintiff, and that the motion of the plaintiff in error for a new trial in said suit was overruled on the 27th day of May, 1916, and the original case-made of said judgment and the pleadings and proceedings had in the said action in said District Court are hereto attached *hereto* and made a part of
20 this petition in error.

The said Jacob M. Dickinson, as receiver of the said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, alleges that there is manifest error in said judgment and proceedings, affecting materially the substantial rights of the plaintiff in error in this, to-wit:

First. That the trial court erred in overruling the motion of the plaintiff in error for a new trial.

Wherefore, plaintiff in error prays that said judgment be reversed, set aside and held for naught and that this cause be re-

manded to the trial court, with instructions to render a judgment in behalf of the plaintiff in error, dismissing the action.

C. O. BLAKE,
R. J. ROBERTS,
W. H. MOORE,
K. W. SHARTEL,
Attorneys for Plaintiff in Error.

21 Triplicate.

Paging, etc., Same as Original.

In the District Court of Oklahoma County.

No. 19216.

EVA ROBERTS COLE, Admx., Plaintiff,

vs.

JACOB M. DICKINSON, Receiver, Defendant.

Case-made.

Filed in Supreme Court of Oklahoma Nov. 18, 1916.
WILLIAM M. FRANKLIN, *Clerk.*

Filed in District Court of Oklahoma County, Oklahoma, Nov. 2, 1916.

JAMES BEATY,
Court Clerk,
By CLIFF MYERS,
Deputy.

22 *Index.*

Petition	2	6
Answer	8	9
Reply	..	11
Witnesses:		
Deposition, Frank Swayze	13	25
Mrs. E. L. Tremblay	26	29
Fred Fesler	30	40
M. A. West	41	48
J. A. Malone	49	59
Mrs. A. W. Roberts	63	67
Mrs. Eva Cole	68	72
" " "	..	83
Claude Roberts	73	80
C. O. Cole	..	81
C. F. Semmelback	..	82
E. E. Yates	86	125

J. J. Bergoyle	123	145
R. B. Howard	143	155
Patrick Quinn	156	167
Harold Cochran	175	186
A. Sparks	187	193
A. T. Stroud	194	205
Alice M. Reed	206	211
Cora Avritt	212	218
Mrs. A. B. Jones	219	221
Bert New	222	227
R. B. Cook	228	229
Plaintiff's Exhibit A	..	22½
Plaintiff's Exhibit B	61	62
Plaintiff's Exhibit C	..	168
Plaintiff's Exhibit D	231	237
Defendant's Exhibit 1	..	85
Defendant's Exhibit 2	..	170
Defendant's Exhibit 3	..	171
Defendant's Exhibit 4	..	172
Defendant's Exhibit 5	..	173
Defendant's Exhibit 6	..	174
Motion for Directed Verdict	..	238
Stenographer's Certificate	..	240
Plaintiff's Requested Instructions	242	244
Defendant's Requested Instructions	246	248
Court's Instructions	250	257
Verdict	..	259
Motion for New Trial	261	262
Journal Entry of Judgment	264	265
Order Overruling Motion for New Trial	267	268
Order Extending Time to Make Case-made	..	270
" " " " " "	..	272
Tender & Acceptance of Case-made	..	274
Waiver of Suggestion of Amendments	..	275
Waiver of Notice of Time & Place of Settlement	..	276
Certificate of Judge	..	277
Waiver of Summons in Error	..	278

23 In the District Court within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratris of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver Chicago, Rock Island & Pacific Railroad Company, Defendant.

Case-made.

Be it remembered that on March 25, 1916, the above named plaintiff commenced her action against the above named defendant by filing in the District Court of Oklahoma County, State of Oklahoma, with the clerk thereof, her petition, and causing summons to be issued thereupon, which petition, together with the endorsements thereon, is in words and figures as follows, to-wit:

Filed in District Court of Oklahoma County, Oklahoma, Nov. 2, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy.

24 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the District Court in said County and State.

No. —.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKENSON, Receiver Chicago, Rock Island & Pacific Railroad Company, Defendant.

Petition.

Comes now the above named plaintiff and for cause of action against the above named defendant, represents:

I. Plaintiff, Eva Roberts Cole is the daughter of A. W. Roberts, deceased, is the duly appointed, qualified and acting administratrix of the estate of A. W. Roberts, deceased, having been appointed such administratrix by the County Court of Oklahoma County, Oklahoma, Sarah F. Roberts is the surviving widow of said A. W. Roberts and Claude Roberts and Barnum Roberts are the surviving sons of

said A. W. Roberts, the said Eva Roberts Cole, Sarah F. Roberts, Claude Roberts and Barnum Roberts, being the sole heirs at law of said A. W. Roberts, deceased.

II. Defendant, Jacob M. Dickenson, is now and was on the 11th day of December, 1915, the duly appointed and acting Receiver of the Chicago, Rock Island and Pacific Railway Company.

III. On December 11th, 1915, between the hours of 9 and 10:00 o'clock A. M., at the crossing of the tracks of the Oklahoma
25 Railway Company and the Chicago, Rock Island and Pacific Railway Company, south of Olie Street in Oklahoma City, Oklahoma County, Oklahoma, the said A. W. Roberts was hit and struck by one of the engines of the defendant, Jacob M. Dickenson, Receiver of the C. R. I. & P. Ry. Company and instantly killed. At the place where said A. Q. Roberts was killed, there was a pathway and passway leading from Western Avenue on the west and going across said tracks of the above said railway companies, which had been long since, with the knowledge, consent and acquiescence of the C. R. I. & Pac. Ry. Co., and of said Jacob M. Dickenson, Receiver, used by the public in passing back and forth and was recognized on said December 11, 1915, and long prior thereto, as a public passway by both said C. R. I. & Pac. Ry. Co. and said Jacob M. Dickenson, Receiver of said C. R. I. & Pac. Ry. Co.

IV. Said A. W. Roberts was using due care for his own safety at the time of his injury and was not killed on account of any fault or negligence of his own.

V. Said A. W. Roberts was killed on account of negligence, that is, the want of ordinary care on the part of the agents and servants of defendant in charge of said engine that struck and killed said A. W. Roberts, and on account of each of said acts of negligence:

First. Said agents and servants failed to use ordinary care to keep a lookout in said engine and along the railway track of defendant; that the place where said accident occurred was in the City of Oklahoma, a city of about 80,000 inhabitants: that it was well known to defendant, his agents and servants on said December 11, 1915,
26 and long prior thereto, that at said place persons were likely to be killed; that if said agents and servants had used ordinary care in keeping a proper lookout in front of said engine at said time and place, they would have discovered said A. W. Roberts in time to avoid injuring him by the use of appliances at their command.

Second. The agents and servants in charge of said engine, failed to ring the bell or blow the whistle of said engine as it was approaching said place where said injury occur-ed. Said engine was going east and said agents and servants in charge of the same failed to blow the whistle for the crossing of Western Avenue, by the tracks of said railway Company, said Western Avenue being a short distance west of the place where the death of said A. W. Roberts occurred; it was negligence, that is, the want of ordinary care on the part of said servants and agents in charge of said engine to fail to blow said whistle and ring said bell; that if said whistle had been blown or the said bell had been rung, said accident would not have occur-ed.

Third. Said engine at the time it struck and killed said A. W. Roberts, and just before it struck and killed him, was running at the rate of twenty *and* twenty-five miles per hour; that said agents and servants in charge of said engine, ran said engine too fast at said place; that it was negligence, that is, the want of ordinary care on the part of said agents and servants in charge of said engine to run said engine at such speed at said time and place, and running said engine at such speed of twenty to twenty-five miles per hour, was contrary to a valid ordinance of the City of Oklahoma in full force and effect, providing that no engine should be run to exceed twelve miles per hour in said city; that the violation of the provision of said ordinance was negligence. If said engine had not been running at such speed, said A. W. Roberts would not have been killed.

27 Fourth. Said agents and servants in charge of said engine, after they discovered that said A. W. Roberts was upon the track of the defendant, was in a position of im-inent peril and likely to be struck by said engine, failed to use ordinary care to stop said engine by the use of the appliances at their command, after they discovered the im-inent peril and danger of said A. W. Roberts, the said engine would have been stopped, would not have hit said Roberts and his death would not have occur-ed.

VI. At the time of his death, said A. W. Roberts was 84 years old, in good health and a strong and vigorous man for his years, was in full possession of all his faculties, engaged in trading and farming and actively attending to his busine s and earning from One Thousand to Fifteen Hundred Dollars per year. Said A. W. Roberts was kind to and provided well for his wife and his children and devoted and applied his earning- to his wife and children. On account of the death of said A. W. Roberts caused by the negligence of the agents and servants of defendant, the said Sarah F. Roberts and the said Eva Roberts Cole, said Claude Roberts and the said Barnum Roberts, have been damaged in the sum of Three Thousand Dollars ($3000.00) and for said damages, this plaintiff as administratrix of the estate of the said A. W. Roberts, deceased, brings this suit for the benefit of the said Sarah F. Roberts, the said Eva Roberts Cole, the said Claude Roberts and the said Barnum Roberts.

VII. The defendant through often requested so to do, has failed and refused to pay said Three Thousand Dollars ($3,000.00) or any part thereof, and there is now justly due and owing to this plaintiff as administratrix of the estate of A. W. Roberts, for the use and benefit of the said Sarah F. Roberts, this plaintiff, Eva Roberts Cole and the said Claude Roberts and Barnum Roberts, said sum of Three Thousand Dollars ($3,000.00) the same being justly

28 due and owing by defendant.

Wherefore, plaintiff prays that as administratrix of the estate of A. W. Roberts, she have and recover for the use and benefits of the said Sarah F. Roberts, the said Claude Roberts, said Barnum Roberts and herself the said Eva Roberts Cole, the said sum of Three Thousand Dollars ($3000.00).

Plaintiff further prays for judgment for costs and also for all proper relief.

LEDBETTER, STUART & BELL,
Attorneys for Plaintiff.

Endorsed: No. 19126. In the District Court of Oklahoma County. Eva Roberts Cole, administratrix of the Estate of A. W. Roberts, deceased, for herself, Sarah F. Roberts, Claude Roberts and Barnum Roberts, Plaintiff, vs. Jacob M. Dickenson, Receiver Chicago, Rock Island & Pacific Railway Company, Defendant. Petition. Filed in District Court Oklahoma County, Oklahoma, Mar. 25, 1916. James Beaty, Court Clerk, by A. E. Bockoven, Deputy. Ledbetter, Stuart & Bell, Attorneys for Plaintiff (112).

29 Thereafter, and on the 17th day of April, 1916, the defendant filed his answer to the petition of the plaintiff, which answer, as filed, together with the endorsements thereon, is in words and figures as follows, to-wit:

30 In the District Court in and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiffs,

vs.

JACOB M. DICKINSON, Receiver of the Chicago, Rock Island and Pacific Railway Company, Defendant.

Answer.

Comes now the above named defendant Jacob M. Dickinson, as Receiver of The Chicago, Rock Island and Pacific Railway Company, by his attorneys the undersigned and for answer to the petition of plaintiffs herein, denies each, all and singular the allegations therein contained, except such as are hereinafter expressly admitted and expressly admits that on and since October 1st, 1915, he has been operating the line of railroad and property of The Chicago, Rock Island and Pacific Railway Company under authority of the United States District Courts in the Seventh Judicial Circuit and the Eighth Judicial Circuit, and that since said date he has been carrying on the business of an interstate common carrier with such railroad, operating into and through the County of Oklahoma, City of Oklahoma City, State of Oklahoma.

II. Further answering and for a separate defense, this defendant avers that the deceased, A. W. Roberts, while undertaking to approach and cross the line of railroad operated by this defendant in

said City of Oklahoma City, on said date set forth in said petition, failed to use the care and prudence of an ordinary man in
31 looking and listening for the approach or passage of engines, trains or cars at or near said point where he was undertaking to cross, and in failing to exercise the care and prudence of an ordinary man in failing to look and listen for the presence or approach of engines, trains or cars while in the act of crossing the tracks and on the right of way of said defendant. That if said defendant was negligent as alleged in the petition of the plaintiff herein, which — not denied for the purpose of this plea, the said alleged negligence was not the proximate cause of the deceased's injuries and death, but that said injuries and death were directly due to and proximately caused by the deceased's own want of care and contributory negligence as herein set forth.

Wherefore, having fully answered, defendant prays that he may be dismissed with all his costs.

BLAKE & BOYS,
C. O. BLAKE, JR.,
Attorneys for Defendant.

Endorsed: District Court. #19216. Eva Roberts Cole, Admx., et al., Ptffs., vs. Jacob M. Dickinson, Receiver The C., R. I. & P. Ry. Co., Dft. Answer. Filed in District Court, Oklahoma County, Oklahoma, Apr. 17, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy.

32 Thereafter, and on the 27th day of April, 1916, the plaintiff filed her reply to the answer of the defendant with the clerk of said court, said reply, together with the endorsements thereon, being in words and figures as follows, to-wit:

33 In the District Court in and for Oklahoma County, State of Oklahoma.

Case No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of R. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver of Chicago, Rock Island and Pacific Railway Company, Defendant.

Reply.

Now comes the plaintiff and denies each, all and every of the material allegations of new matter contained in the second section of answer of defendant.

Wherefore, plaintiff prays for judgment as asked for in her petition.

LEDBETTER, STUART & BELL,
Attorneys for Plaintiff.

Endorsed: Case No. 19216. In the District Court, Oklahoma County, State of Oklahoma. Eva Roberts Cole, Administratrix, Plaintiff, vs. Jacob M. Dickinson, Receiver for Chicago, Rock Island & Pacific Railway Company. Reply Filed in District Court, Oklahoma County, Oklahoma, Apr. 27, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy. Ledbetter, Stuart & Bell, Attorneys for Plaintiff.

34 Thereafter, on May 17, 1916, after setting of said cause and notice of the setting having been given to counsel, the said cause was called for trial *on* accordance with said previous setting, and the parties, by their attorneys, having announced ready, the cause was tried. The statement of the plaintiff's case was made by R. R. Bell. The statement of the defendant's case was made by R. J. Roberts. Witnesses were thereafter called on behalf of the parties. The testimony of the witnesses and the proceedings had in the trial of the cause of said date, are in words and figures as follows, to-wit:

35 By Mr. Smith: Plaintiff offers in evidence deposition of Frank Swayze.

(Thereupon, said deposition is read in evidence to the jury, and is in words and figures as follows, to-wit:)

STATE OF OKLAHOMA,
Oklahoma County, ss:

In the District Court of said County and State.

Case No. 19216.

EVA ROBERTS COLE, Administratrix, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver Chicago, Rock Island & Pacific Railway Company, Defendant.

Deposition of Frank Swayze.

H. L. Stuart, being present and acting as attorney for the plaintiff and Mr. R. J. Roberts being present and acting as attorney for the defendant, agree that notice of the time and place of taking the deposition of witness Frank Swayze are hereby waived, that the answers of the witness may be taken down by Inez B. Frary in shorthand and may afterwards be transcribed by her, that said witness

be sworn by Inez B. Frary, Notary Public, that errors in the manner and form of taking and returning deposition are hereby
36 waived, that objections for incompetency, immateriality and irrelevancy may be made to the questions and answers at the time that the deposition is read in evidence with the same force and effect as if the said objections were made at the time of taking said deposition, and that signature of the witness to said deposition is waived.

____ ____,
____ ____,
Attorneys for Plaintiff.
____ ____,
Attorney for Defendant.

Answers and Deposition of the Witness Frank Swayze, Taken Before Inez B. Frary, a Notary Public in and for Oklahoma County, Oklahoma, on the 5th Day of May, 1916, in Accordance with the Above Agreement of Counsel, After said Witness Was Duly Sworn According to Law.

Questioned by Mr. H. L. Stuart:

Q. What is your name?
A. Frank Swayze.
Q. What is your age?
A. 66.
Q. Where do you live?
A. Now?
Q. Yes sir.
A. 813 North Klein Street.
Q. How long have you lived in Oklahoma City?
A. Twenty four years.
37 Q. What business are you engaged in?
A. I am a contractor.
Q. Do you know where Tremblay's bakery on North Western Avenue in Oklahoma City is located?
A. Yes sir.
Q. Do you know of a path or pass way beginning near Tremblay's bakery and running in a southeastern direction?
A. Yes sir.
Q. Described said path way where it begins and how it runs and where it runs.
A. I should judge that the entrance to that alfalfa field starts about 50 feet south of Tremblay's bakery on the east side of Western Avenue and goes southeast by a little oil tank on the south side and intersects with what we call Ollie Street and the Rock Island Track and Oklahoma City Railway Company track.
Q. Where does the pathway go after leaving Ollie Street the Rock Island Tracks and the tracks of the Oklahoma Railway Company?
A. Well it goes on the east side of the Oklahoma Railway track

to Second Street—there is where sometimes we leave the railroad entirely and sometimes we keep along the path to Main Street.

Q. How long have you known this pathway beginning about sixty feet south of Tremblay's bakery on the east side of Western
38 Avenue?

A. Ever since it has been a path.

Q. How long have you known the path to be there?

A. I suppose about fifteen years.

Q. Please state to what extent, if any, has said pathway been used by the public?

A. Everybody goes across it that wants to.

Q. Have you gone across said pathway yourself?

A. Lots of times.

Q. Have you ever been forbidden by anybody to use said pathway where it crosses the tracks of the Rock Island?

A. No sir.

Q. Have you ever known of anybody ever having been forbidden by anyone to cross said tracks of said Rock Island Railway Company at place where it is intersected by said pathway?

By Mr. Roberts: We object to that as incompetent, irrelevant and immaterial.

By the Court: Sustained immaterial.

By Mr. Bell: Exception.

(The answer to said question, which was not read to the jury, was A. No sir.)

Q. Did you know A. W. Roberts, deceased, during his life time?

A. Yes sir.

Q. Is said Roberts dead or alive?
39 A. He is dead.

Q. Do you remember the day of his death?

A. Yes, I remember the day he got killed.

Q. Do you remember what month and what year?

A. On December 11, 1915.

Q. Did you see said Roberts on said December 11, 1915?

A. Yes, sir.

Q. Where did you see him on that day?

A. I met him as I was going to town on Western Avenue just east of his home place on Sixth Street.

Q. Where did you go after you saw him?

A. We walked up the sidewalk to Tremblay's bakery.

Q. What did you do when you reach- Tremblay's bakery?

A. He said he was going in Tremblay's bakery.

Q. Please state whether or not when you got to Tremblay's bakery you parted and which way you went and which way he went?

A. He went into the bakery and I stood outside.

Q. Did you see him any more after that?

A. Yes, sir.

Q. Where was he when you saw him after that?

A. I had walked probably fifty or seventy five feet south of Trem-

blay's bakery and was standing in front of a little shoemaker's shop on the east side of Western Avenue, he came out of Tremblay's bakery and walked across the street to me. We started across the alfalfa patch.

40 Q. Please state whether or not the alfalfa patch and the pathway you have testified to are one and the same?

A. Yes, sir.

Q. Please state what it is?

A. Well, it shows the Rock Island Railway Track and the Oklahoma Railway Company track.

Q. Please state whether or not it shows the pathway you have mentioned in your testimony?

A. Yes, sir.

Q. Please state whether or not it shows the path approaching from the north or from the south?

A. It approaches the Rock Island Railroad from the north.

Q. Can you mark in the path shown in said picture prominently the place you last saw Mr. A. W. Roberts with a cross mark?

A. Yes, sir.

Q. Will you please do so?

A. I have done so.

Q. In what direction was Mr. Roberts going at the time you last saw him?

A. He was going south and east.

Q. Which way was he headed?

A. Towards the business part of Oklahoma City.

Q. Was he walking or standing still when you saw him?

A. Walking.

41 Q. How close to the tracks of the Rock Island Railway company was he when you last saw him?

A. I cannot tell within a few feet, but I should judge 150 feet, it might have been 200 feet.

Q. What did you do after you saw him last?

A. I was in — automobile when I saw him last. I went around to Harris' Meat House on Second Street.

Q. Did you cross the Rock Island tracks?

A. Yes, sir.

Q. Did you hear a train about that time?

A. Yes, sir, I heard one coming.

Q. Did you cross the Rock Island tracks before the train crossed Western Avenue?

A. Yes, sir.

Q. Where were you with regard to the Rock Island tracks when you saw Mr. Roberts the last time?

A. Well, I was about fifty feet north of the track.

Q. On Western Avenue were you?

A. Yes, sir.

Q. How far south of the track were you when the train crossed Western Avenue?

A. I was on Second Street, right south of Klein's Foundery.

Q. What distance in feet were you south of the Rock Island track on Western Avenue when said train crossed Western Avenue?

A. I should judge it was about two hundred feet.

42 Q. Did you see Mr. Roberts again?

A. Yes, sir.

Q. Where was it you saw him?

A. Down at the undertaker's.

Q. Was he alive or dead?

A. Dead.

Q. Did you notice the speed of the train?

A. No, sir.

Q. Do you remember how far west the train was when you crossed the Rock Island track on Western Avenue?

A. Coming up about the Willard School.

Q. Do you know on what street the Willard School is on?

A. I think on McKinley and Second Street.

Q. Do you know or can you approximate the distance from Western Avenue to McKinley Avenue?

A. I should think somewhere around one half mile, about five blocks.

Q. How long did you know A. W. Roberts before he died?

A. I have known him ever sice he lived out in that neighborhood, ever since he came out there, about fifteen years ago.

Q. Was his health apparently good or bad when you saw him on said last December 11th?

A. Seemed to be good to me.

Q. Do you know whether or not he was a man of good business ability?

A. I consider him so.

Q. Do you know of him trading?

43 A. He did right smart real estate trading and built several houses.

Q. Was his hearing good or bad?

A. I think it was pretty good, I never had any trouble talking to him and his understanding me.

Q. Please state whether or not you heard the train whistle?

A. Yes, I heard it whistle for Western Avenue.

Q. Had you crossed the Avenue then?

A. I had crossed the avenue, crossed the railroad track on Second Street, I heard it whistle along up them further streets.

Q. You say you did not notice the speed of the train?

A. No, sir.

Q. Could you tell from what you heard whether it was running fast?

A. Well, I couldn't tell just how fast it was running, never paid any attention to it. I did not see it cross Western Avenue because I was behind Klein's Foundry.

Q. Where is Klein's Foundry located?

A. Between Ollie and Western Avenue on Second Street.

Q. Do you know approximately how far it is from where the Rock Island tracks cross Western Avenue to the place where the pathway

you have mentioned, crosses the Rock Island tracks and Ollie Street and the Oklahoma Railway track?

44 A. How far it is from Western Avenue?

A. Yes sir.

A. There is a block of ground in there, somewhere around four hundred feet I should judge.

Mr. Bell: Plaintiff offers in evidence this picture which has been identified by the Reporter as Plaintiff's Exhibit A, and asks that it be exhibited to the jury.

By the Court: If there is no objection, let it be admitted.

Thereupon: Plaintiff's Exhibit A is admitted in evidence and exhibited to the jury, and a copy thereof is made a part hereof and is attached hereto:

(Here follows picture marked p. 45.)

Plaintiff's Exhibit "A"

No. 8443.
C. R. S. P. Ry. Co. } Pltf.
vs.
Cooley, Admx. } Def.

Cross-examination.

By Mr. Roberts:

Q. Did you hear the bell ringing on this Rock Island train as it ame down here?
A. I could not swear to that, I do not believe I did.
Q. I hand you plaintiff's Exhibit 1, calling your attention to those respass signs in the picture. I will ask you how those trespass signs r other trespass signs have been at the place where the Oklahoma Railway Company tracks cross the Rock Island tracks at the place he path crosses them?
A. I don't know that I ever noticed any signs on the Rock Island rack. I know there used to be a sign right near this pole before it as put in there.
Q. That was on the Rock Island right of way was it?
A. Yes sir.
Q. Was there a sign similar to this Rock Island trespass sign on he Rock Island Right of way at the time of the accident?
A. I am not right positive, it isn't where it used to be.
Q. Was there one there, if not at that exact point, at the time of the ccident?
A. I could not answer that, I am not positive.
Q. You were positive about the trespass signs of the Oklahoma Railway Company being there at the time of the accident?
A. Yes sir.
Q. And you do know that there was a trespass sign on the Rock Island right of way prior to the accident?
A. Yes sir I think that sign was on this pole before you put up this respass sign.
Q. Do you know how many trespass signs were at the intersection f the Oklahoma Railway Company and Rock Island tracks at the ime of the accident?
A. I am not right positive about the Rock Island sign, I know it sed to be there, but they moved it and I have not paid much attenion to it.
Q. You know that there was at least one there all the time?
A. Yes sir.
Q. That it could be seen easily by any person crossing the tracks t that point if they had looked?
A. Anybody could see them if they wanted to see them.

Redirect examination.

By Mr. Stuart:

Q. Have you ever crossed the tracks of the Rock Island in said athway when any railway men were working on the track?
A. Lots of times.
Q. What were the men doing when you crossed the track?
A. They were putting all this business in there and fixing it.
Q. Did any one of them say anything to you about crossing there r not crossing there?

48 By Mr. Roberts: To which question the defendant objects as immaterial.

By the Court: Sustained.

By Mr. Bell: Exception.

(The answer to said question, which was not read to the jury was A. No.)

Q. Please state whether or not anyone of them forbid you crossing there?

By Mr. Roberts: That is objected to as immaterial.

By the Court: Sustained.

By Mr. Bell: Exception.

(The answer to said question, which was not read to the jury, was, A. No.)

STATE OF OKLAHOMA,
Oklahoma County, ss:

I, Inez B. Frary, a Notary in and for Oklahoma County State of Oklahoma, do hereby certify that the above and foregoing is the testimony of Frank Swayze and that I took down the testimony of said Frank Swayze in shorthand and transcribed the same.

Witness my hand and seal of office on this the 5th day of May, 1916.

[SEAL.] INEZ B. FRARY,
Notary Public within and for Oklahoma County, State of Oklahoma.

My commission erpires on the 6th day of April, 1921.

49 Mrs. E. L. TREMBLAY, called as a witness on behalf of the plaintiff being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. State your name.
A. Mrs. E. L. Tremblay.
Q. Where do you live?
A. 501 North Western.
Q. What business are you engaged in, or your husband?
A. Bakery.
Q. That is where the Tremblay Bakery is?
A. Yes sir.
Q. Which side of Western Avenue is that?
A. On the west side.
Q. Where is your place of business with reference to the pathway

that leads out near the crossing of the Rock Island and Oklahoma Railway Company in a northwesterly direction?
A. Just south of it.
Q. Did you know Mr. Roberts during his lifetime?
A. Knew him four years.
Q. Where did he live with reference to your bakery?
A. On west Sixth.
Q. How far from you?
A. Just two blocks.
50 Q. Did you know him well?
A. Yes sir.
Q. Do you remember hearing about his being killed?
A. Yes sir.
Q. Was he in your bakery prior to that time?
A. Yes sir.
Q. About what time of day Mrs. Tremblay?
A. Between eight and nine.

By Mr. Roberts: Objected to as immaterial. No question raised as to the location and movements of the deceased.
By the Court: Sustained.
By Mr. Bell: I am going to ask if he went out.
By the Court: You may proceed.
By Mr. Roberts: Defendant excepts.

Q. About what time of — day was he in there?
A. Between 8 and 9.

By the Court: That is the morning before the accident.

Q. Did he leave the bakery?
A. Yes sir.
Q. Where did he go?
A. Went across down to the court house.

By Mr. Roberts: We move to strike the answer.
By the Court: Sustained.

Q. Where did you see him?
51 A. I saw him as he went out the front door.
Q. Do you know Mr. Swayze?
A. Yes sir.
Q. Where was he that morning?
A. Out on the sidewalk waiting for him.
Q. How long was it that you saw him go out of the door before you heard of the accident?
A. About fifteen minutes.

By Mr. Roberts: Objected to as immaterial.
By the Court: Sustained.
By Mr. Bell: If the Court please we have a right to show that.
By the Court: The objection is sustained.
By Mr. Bell: We except because it is a circumstance of the res

gesta- showing the trip and the journey that he made just before the accident.

Q. Mrs. Tremblay are you acquainted with the pathway leading from near your bakery south east towards the Rock Island track?
A. Yes sir.
Q. How long have you known that pathway?
A. Four years.
Q. I wish you would state what the character of that path as to whether used or unused.
A. It is used.
Q. Is it plain or not?
A. Yes sir.

52 Q. I will ask you to state if you know what road people going along Western Avenue coming to Oklahoma City use in coming down towards Oklahoma City?
A. The path way.

By Mr. Roberts: Objected to as immaterial.
By the Court: Overruled.
By Mr. Roberts: Exception.

Q. What is your answer to that, that it was used?
A. Yes sir.
Q. How frequently is it used?
A. All the time.
By Mr. Bell: We have exhibit A showing a picture of the pathway here.
Q. I will ask you if you recognize that picture there of the pathway (Exhibits Exhibit A to witness)?
A. Yes sir.
Q. What does that pathway lead through first there?
A. The alfalfa patch.
Q. State whether or not it is worn down whether there is alfalfa in the pathway?
A. No it is worn down.

By Mr. Bell: Take the witness.
By Mr. Roberts: No questions.

Witness Excused.

53 FRED FESLER, called as a witness on behalf of the plaintiff, being first duly sworn, on oath testified as follows, towit:

Direct examination.

By Mr. Bell:

Q. State your name?
A. Fred Fesler.
Q. Where do you live?
A. At present I live at 2915 North Harvey.
Q. Where did you live about the 11th day of December 1915?

A. 1121 West 7th.
Q. Did you know A. W. Roberts, did you know him during his lifetime?
A. Yes sir.
Q. Mr. Fesler what business are you engaged in?
A. I am clerk in the Railway Mail service.
Q. Do you remember the occasion when A. W. Roberts was killed?
A. Yes sir.
Q. Where were you at that time Mr. Fesler?
A. I was on a Belle Isle Street Car on my way home.
Q. Where was that Belle Isle car situated?
A. It has stopped just south of the crossing waiting for the train to go by. It was north bound.
54 Q. Did you see Mr. Roberts there?
A. Not until after the accident.
Q. Not until after the accident?
A. No sir.
Q. Just state what you saw of him and when.
A. Do you mean of Mr. Roberts?
Q. Yes.
A. Well first I saw of him he was lying I think it was close to the next track north. There is two or three tracks there and he was lying it seemed to me with his head right close to the south rail of the next track north of the one the train was on. He was kind of huddled up. I didn't go over there.
Q. Was he dead or not?
A. I couldn't tell from where I was.
Q. Did you see that train coming in?
A. Yes sir.
Q. About what time in the morning was that, do you know?
A. No I don't, it must have been close to nine o'clock or 9:30, something like that. I know I was due in at that time at 8:40 and I had unloaded the mail and registered in and started home. It was somewhere between nine and ten o'clock.
Q. Do you know whether that train was on time or not?
A. No sir, it was late.
Q. Do you know how much?
55 A. No sir I don't.
Q. What direction was that train coming?
A. It was coming from the west, east bound train.
Q. Have you ridden on trains much Mr. Fesler?
A. I have been in the service about 12 years.
Q. Did you observe trains running,—I say have you ever observed trains running?
A. Yes sir.
Q. Mr. Fesler what speed was this train running at that time?
A. Well I judge at a conservative estimate it was going about twenty miles an hour.
Q. Do you know where Western Avenue is there, do you?
A. Yes sir.

Q. Did you hear any whistle blown for Western Avenue or above the Avenue?

A. I don't remember any.

Q. Now Mr. Fesler do you know the pathway that leads out from about where this Rock Island crosses the Oklahoma Railway Company tracks into a north west direction across the alfalfa field?

A. I know where the path is, yes sir.

Q. Is that a plain path or not, worn?

A. Yes sir it is a pretty plain path.

Q. Do you know whether that is used by the public or not?

A. Yes sir it looks like it was used a good deal, it is through
56 the alfalfa field if I remember correctly.

Q. How long have you known Mr. Roberts?

A. I have known Mr. Roberts for years, I suppose 15 years or twenty.

Q. Do you know whether he was an active man, business man, or not?

A. Yes sir the old gentleman was quite an active business man the last I saw of him he seemed to be quite active.

Q. That's all.

Cross-examination.

By Mr. Roberts:

Q. What part of the car were you sitting that stood there on the south side of the crossing?

A. I was sitting in the—The Belle Isle car has two compartments and I was sitting in the front compartment, sitting in the seat that runs along the side of the car.

Q. Which side?

A. East side.

Q. You could see down west then along the Rock Island right of way?

A. Yes sir.

Q. How far down could you see?

A. I saw that train a block or two away I guess I heard it
57 coming is the reason I didn't see the accident, I turned around to see the train come in.

Q. Did you hear the bell ringing?

A. Yes sir.

Q. You are not sure whether you heard the whistle?

A. No sir.

Q. You could hear the train itself?

A. Yes sir.

Q. And see it for as much as a block or two away?

A. Yes sir.

Q. You didn't look to the north, you don't know whether Mr. Roberts was then crossing the track?

A. No sir I didn't see Mr. Roberts.

Q. You didn't see him until after the accident?

A. No sir.

Q. Upon what do you base your judgment that this train was running twenty miles an hour?

A. Well I am not expert, I just made that as a conservative estimate.

Q. You are not offering that as expert testimony?

A. No sir.

By Mr. Roberts: We move to strike the answers of the witness as incompetent, irrelevant and immaterial.

By the Court: Overruled.

By Mr. Roberts: Exception.

58 Q. Didn't you know Mr. Fesler that when you stand in front of a train, of a moving train, and see it or almost in front of it, and see it coming towards you that you can't tell anything about the speed of the train?

A. No I don't know that to be a fact.

Q. Don't you know you can stand in front of a moving train as it comes towards you with a headlight and be absolutely unable to tell whether it is moving at all or not, whether there is any speed acquired by the train?

A. If you watch it and see it you can tell whether the train is coming or not.

Q. Yes, five or ten minutes, but I mean during a period of a few seconds, or fraction of a minute, as much as you saw this train coming here at this point don't you know it is impossible to tell whether there is any particular speed being acquired by the train, and sometimes impossible to tell whether it is moving, but you know that to be a fact?

A. No sir I don't know that to be a fact.

Q. What kind of experience have you had, just rode in a mail coach?

A. Yes sir.

59 Q. That don't give you any ability to estimate the speed by posts or anything of that sort does it, in any particular way?

A. No I don't suppose it does. I know more about the speed of a train than someone that doesn't come in contact with them, someone that doesn't work around them.

Q. You know that because you were running and riding on trains and attending to your work inside that you get used to riding on these trains at the ordinary speed, that is your notion of the speed of trains is it?

A. Yes sir.

Q. That's the way you form your estimate of the speed of the train?

A. Yes sir.

Q. Not from seeing them move or estimating them as they pass between certain points, or moving along at a certain rate of speed?

A. No sir only I have timed them when we were on a specially fast train just for my own information.

Q. When you were on the train yourself?

A. Yes sir.

Q. You couldn't see the train moving at that time, all you knew was the time it left one point and arrived at another point?

A. Yes sir.

Q. You didn't look at a train and see it going at a certain
60 speed, and say it was going so many miles an hour, you have never done that?

A. No sir.

Q. You don't mean to offer your guess or estimate here to the jury as a correct estimate of the speed of that train as it reached the point of this accident?

A. No sir I don't that would be impossible to do so I think.

Q. I think so too, do you know that the speed of that train was being slackened?

A. No I never noticed it being slackened until just about the time it came opposite us and he put on the air, I mean he pulled the emergency brake.

Q. You don't know whether or not the brake was being applied prior to the time when the emergency stop was made?

A. No sir.

Q. What was the position of the train with reference to the street car track on which your car was when it came to a stop?

A. If I remember correctly we were about the middle of the train, it was a pretty fair sized train, I think about 8 or 9 cars, and I think we were somewheres about the middle of the train, or possibly a little nearer the rear than it was to the front end.

61 Q. You wouldn't be able to tell how many cars were back of the track on which you were or how many forward?

A. No not correctly.

Q. And you say you couldn't tell by looking at the train as it was coming towards you there whether or not the brakes were applied prior to the emergency stop?

A. No sir.

Q. What runs do you have?

A. I am on the Frisco between here and Monett Missouri.

Q. Have you ever run on the Rock Island between Oklahoma City and west bound points?

A. I don't remember that I have, it seems to me like when I was substitute I made a trip or two east of Oklahoma City, but I don't remember.

Q. You are not offering your testimony in any way related to the experiences on Rock Island trains, the speed they have?

A. No sir.

Q. And you don't want to say to the jury that you are offering this estimate which you make of 20 miles an hour there as a correct estimate of the speed that this train was making at the time of the accident?

A. No sir it would be impossible to make a correct estimate I would think without——

Q. That's all?

62 Redirect examination.

By Mr. Bell:

Q. What is your judgment as with reference to whether it was above or below twenty miles per hour?

By Mr. Roberts: Objected to as purely an opinion, and not based upon qualifications that have been previously ascertained.
By the Court: Sustained as repetition, leading and suggestive.

Q. Mr. Fesler have you ever observed trains when they are passing by, observed their speed?
A. Yes sir.
Q. I believe you told Mr. Roberts that you couldn't give the exact speed that it was running?
A. Yes sir.
Q. Your judgment though is that it was running at least twenty miles per hour?

By Mr. Roberts: Objected to as leading and suggestive.
By the Court: Sustained.

Q. What is your judgment with reference to the lowest speed it was running?
A. As I said before I think twenty miles an hour was conservative.

By Mr. Roberts: We move to strike the answer as incompetent, irrelevant and immaterial and an opinion.
By the Court: Overruled.
63 By Mr. Roberts: Exception.

Q. Mr. Fesler where is Klein street with reference to Western Avenue, do you know?
A. I believe Klein is the next street west.
Q. Western and Klein both run north and south across the Rock Island Railroad tracks?
A. Yes sir.
Q. That's all?

Witness excused.

64 M. A. WEST, called as a witness on behalf of the plaintiff, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. What is your name?
A. M. A. West.
Q. Where do you live Mr. West?
A. 4127 North Classen.
Q. Do you remember the occasion when A. W. Roberts was killed here in Oklahoma City on the Rock Island line?

A. Yes sir.

Q. Where were you at that time, just tell the jury?

A. About 100 yards straight north of the Interurban line.

Q. Was there anything to obstruct your view of his location at that time?

A. Yes sir I didn't see the old man until after he was hit he was knocked passed my view when the train hit him.

Q. Just tell the jury what you saw of it?

A. Well I saw the train coming from the west it was some time in the morning. I didn't pay any particular attention to the train, and it struck something, I didn't know for sure at the time just what it struck.

Q. What did you see?

65 A. Just went up in the air, I didn't know whether it was a man or a dog or what it was until after I went down there.

Q. You say that the engine struck something and it went up in the air?

A. Yes sir.

Q. Where were you?

A. Straight north of the track.

Q. What were you doing there?

A. Just going down to the Rock Island tracks to catch an interurban. They didn't stop anywhere else.

Q. You were walking?

A. Yes sir.

Q. You are the son of Dr. A. K. West?

A. Yes sir.

Q. What did you do when you saw something knocked up in the air?

A. I run down there.

Q. What did you find there?

A. The old gentleman was lying on the north side of the track and the train had stopped by that time.

Q. Where was the train at that time, where was it located?

A. It had passed, all but I think the la t coach, in my judgment. I didn't pay much attention to it.

Q. Did you observe the train as it was coming in there?

66 A. Yes sir.

Q. Have you ever ridden on trains or observed trains moving, their motion?

A. I have ridden and I have observed their motion, I never timed a train.

Q. What speed was this train making at that time Mr. West?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, the witness not properly qualified.

By the Court: Overruled.

By Mr. Roberts: Exception.

A. Well it was in my judgment from twenty to twenty-five miles an hour.

Q. How long have you lived here in Oklahoma City?
A. About sixteen years.
Q. How old are you now?
A. Twenty.
Q. Does your father own an auto or you, either one?
A. My father does.
Q. Have you driven it a good deal?
A. Yes sir.
Q. Mr. West did you notice any pathway leading in a north western direction across that alfalfa field there or did you pay any attention to that?
A. I never paid any attention to it at the time. I know there is a path through there.
67 Q. Did you see Mr. Roberts or notice him prior to the time you saw him thrown up in the air?
A. I didn't see him at all.
Q. How far was he knocked there?
A. I don't know.
Q. How high in the air did you see him thrown?
A. About half way up the engine or a little higher it looked like.
Q. That's all.

Cross-examination.

By Mr. Roberts:

Q. You say you were about a hundred feet north of the track on which the Rock Island train was running?
A. I can't say exactly how far it was, I didn't pay much attention to that.
Q. I am only trying to go over your testimony on direct examination, is that about what you said?
A. Yes sir about.
Q. Walking south?
A. Yes sir.
Q. Was there anything to obstruct your view of the train which struck Mr. Roberts?
A. Nothing of the train, no sir.
Q. There were no cars on the tracks?
A. No sir.
Q. How far away was the train when you first saw it?
A. About Western Avenue, crossing Western Avenue.
68 Q. Did you hear it give any signals?
A. Not that I know of.
Q. You wouldn't say that it didn't?
A. No, sir, I wouldn't say it didn't.
Q. You didn't notice any?
A. I didn't notice any.
Q. You were paying attention to the engine as it came down the track?
A. Yes, sir.

Q. I believe you said you didn't recall any correct estimate of the length of that train the number of cars, or did you testify on that?

A. I didn't testify on that.

Q. Do you know?

A. No, sir.

Q. Mr. West, have you ever noticed a train or automobile or vehicle coming towards you while it is in speed or motion of any kind?

A. Yes, sir.

Q. Is it or is it not harder to tell the speed of the train when it comes almost directly towards you than it is when you see it at right angles going between points?

A. I am not an expert on that, I don't know.

Q. Well, don't you know whether it is harder or easier to tell one way or the other?

69 A. Well, it is if you don't get a clear view of the train or automobile coming towards you, but you can tell by the sway, you can give it more correct coming sideways than you can coming right towards you.

Q. A great deal, can't you?

A. Yes, sir.

Q. When you are standing almost directly in front of a moving train or automobile it is difficult to estimate the speed of that train or automobile?

A. Yes, sir, if you are directly in front.

Q. Or at a slight angle on either side, say it is not approximately directly in front, it is much easier to give an estimate when it is at a right angle to you?

A. Yes, sir.

Q. Do you mean to offer your judgment that this is the speed of that train that morning as a correct estimate of the speed?

A. My estimate of the speed of the train?

Q. Yes, just your judgment?

A. Just my judgment.

Q. Don't you think there might be an error on your part if parties in charge of the train would differ with you as to the speed of the train?

By Mr. Bell: Objected to as calling for a conclusion of the witness.

By the Court: Sustained.

70 Q. Would you feel as an expert who is testifying with reference to the speed of trains Mr. Fesler, that a person would be better able to ascertain the speed of the train if he was upon that train than one who was standing nearly in front of it as it comes towards him?

A. Well, I might say any automobile, if he had a speedometer for the speed of the train surely he would have a better estimation than I would.

Q. Is that the only way you estimate the speed of an automobile, by a speedometer?

A. That is the only correct way.

Q. Then your experience in an automobile will not fit you as an expert to testify as to the speed of a railroad train?
A. No, sir.
Q. Then you are only offering this twenty to twenty five miles as your judgment of this train that was coming towards you that morning?
A. Yes, sir.
Q. You might be mistaken as to that?
A. I might be mistaken as to the train, but not in my judgment.
Q. That's all.

Redirect examination.

By Mr. Bell:

Q. Did you hear any whistle blown for Western Avenue?
A. Not that I know of.
Q. That's all.

Witness excused.

J. A. MALONE, called as a witness on behalf of the plaintiff, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. State your name?
A. J. A. Malone.
Q. Where do you live?
A. 1227 West 5th Street, Oklahoma City.
Q. Do you remember the occasion when Mr. A. W. Roberts was killed by a Rock Island train?
A. Yes, sir.
Q. Where were you at that time, Mr. Malone?
A. I was working for Hardman King Feed and Grain Co. at 304 North Western Avenue.
Q. How far is that from the Rock Island lines?
A. It is just south of the Rock Island.
Q. Do you know whether or not that passenger train was on time that morning it struck Mr. Roberts, or not?
A. No, sir, I think it was late.

By Mr. Roberts: We move to strike the answer.
By Mr. Bell: I don't care about that, I will withdraw that question.

Q. Mr. Malone, what was the first you knew of the accident, just tell the jury.
A. Well, the first I knew was I seen someone running and they said they was running——

By Mr. Roberts: Don't make any statement as to what somebody said.

Q. Where did you see them running?
A. Towards the crossing of the Rock Island and the Interurban lines of the Oklahoma Railway Company.
Q. Where was the Rock Island train at that time, passenger train?
A. It was passing along with the rear coaches about—lacked about one coach I believe of being over the crossing.
Q. Of the Western Avenue?
A. Of the street railway tracks.
Q. What did you do then Mr. Malone?
A. I run down there.
Q. What did you find there?

By Mr. Roberts: Objected to as a repetition.
By the Court: Overruled.
By Mr. Roberts: Exception.

A. I found an old gentleman down there by the railroad.
Q. Which side of the railroad was he on?
A. On the north side.
Q. Well, was he dead at that time?
A. Yes, sir.
Q. That — A. W. Roberts, was it?
A. Yes, sir.
74 Q. Did you see that train before it hit him as it came along there?
A. Yes sir.
Q. Have you ever observed trains as they passed by and the speed of trains?
A. Yes sir I most always notice the trains that pass there, I think so.
Q. You have ridden on trains have you?
A. Yes sir.
Q. How long have you worked at that place?
A. Since January 6, 1914.
Q. Mr. Malone what speed was that train running at as it passed there that day?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, the witness not properly qualified.
By the Court: Overruled.
By Mr. Roberts: Exception.

A. Well I would answer, my judgment running about 20 miles an hour.
Q. Have you observed the trains as they passed there from the time you have been there?
A. Yes sir most of them.
Q. Where is Klein street with reference to Western Avenue there?
A. It is the first street west of Western avenue.

75 Q. Was there any whistle blown for Western Avenue there on this occasion?
A. I never heard any.
Q. Do you know what hour that train is due in there?
A. It is due, that is it always comes along there sometime after 8 o'clock every morning.
Q. What time did it come along that day?
A. I think it was something near ten.
Q. How come you to observe the speed of the train there?

By Mr. Roberts: Objected to as immaterial.
By the Court: Overruled.
By Mr. Roberts: Exception.

A. Well my work requires me to be out and in all the time, through the elevator and into cars, and most generally you have the car doors open, both next to the mill and the outside also next to the railroad while we are loading, and I most generally see all trains that pass through as I go into the car and come out through the elevator and around.

By Mr. Roberts: We move to strike the answer as not responsive.
By the Court: Read the question.

By the Reporter (Reading): Question, how come you to observe the speed of the train there?

By the Court: Objection sustained, not responsive.
76 By the Court: Read the question again.

By the Reporter (Reading): Question, how come you to observe the speed of the train there?
A. In coming out to the car with some grain I looked through the car and observed the speed of it.

Cross-examination.

By Mr. Roberts:

Q. Have you ever had any experience in timing trains Mr. Malone?
A. No sir.
Q. Have you ever been in any business that required your riding on trains constantly, like mail clerk or anything of that kind?
A. No sir not constantly.
Q. Have you ever traveled to any great extent?
A. Well no geat extent, no sir.
Q. You have just been working down there at the grain company and noticed the trains as they came by going down to the Rock Island Station and coming away from the Rock Island station?
A. Yes sir.
Q. Where does the Frisco run with reference to where you are, can you see it from your work?
A. No sir not from the work, that is nothing only where it comes

in next to the Rock Island south by looking down the Rock Island tracks is all.

77 Q. Do you think you could give to the jury an estimate of the speed of every train that passed by there Mr. Malone?

A. Only my judgment.

Q. Do you offer that as a correct idea of the speed of that particular train that you are giving your judgment of at any time?

A. Do you mean the exact speed?

Q. I mean an approximately correct estimate of the speed, would you say, or offer your judgment as that?

A. I could give the approximate speed, yes sir.

Q. You think your judgment in other words is sufficiently reliable to give to the jury for example an approximately exact idea of the speed of the train. I mean within half a mile or such a matter of the speed the train is coming that you are judging?

A. No sir I wouldn't say within that close a space.

Q. You have never had any special training in estimating the speed of trains have you?

A. No sir.

Q. Never paid any special attention to it?

A. No sir.

Q. Just like any of the rest of us, we see something going by any we say that's going 10 miles an hour or 15 miles an hour or

78 fast or slow, that's all you mean to offer your testimony as isn't it?

A. Well I suppose so.

Redirect examination.

By Mr. Bell:

Q. You know it was going over 12 miles an hour don't you?

By Mr. Roberts: Objected to as leading and suggestive.

By the Court: Sustained.

By Mr. Roberts (to Mr. Ball): You haven't been sworn.

Q. Mr. Malone do you know whether or not there is any pathway running from Western Avenue north of the railroad tracks down in a southeast direction towards the intersection of the Rock Island with the Oklahoma Railway company tracks?

A. Yes sir there is.

Q. I wish you would tell the jury if you know how much that pathway is used by the public?

A. Well it is used generally by residents.

Q. Coming from Western Avenue on down towards Oklahoma City?

A. Yes sir.

Q. Is it a plain path or not?

A. Yes sir it is an old beaten path.

Q. Now that path is through an alfalfa field I believe isn't it?

A. Yes sir.

79 Q. And where the path is the alfalfa is worn out?
A. Yes sir.

By Mr. Roberts: Objected to as leading.

Q. That's all.

Recross-examination.

By Mr. Roberts:

Q. Mr. Malone you have noticed the trespass signs have you at the intersection of the Rock Island and the street railway tracks?
A. Yes sir.
Q. They have been there constantly since that has been used as a crossing by the people using this path?
A. Yes sir.
Q. How many of them are there?
A. Well there is one I think there and there is one there next to fourth street or fourth and Ollie.
Q. I mean at this intersection where the street railway goes across the Rock Island right at that point how many of those trespass signs are there around there?
A. I believe there's two if I am not mistaken.
Q. Can you locate them?
A. One of them I believe is on the west side of the Oklahoma Railway Company and north of the Rock Island tracks and I am not sure whether one is on the Rock Island between the two tracks or
80 not.

Q. Calling your attention to plaintiff's Exhibit A (Handing witness Exhibit A), which I hand you, and directing your attention to the trespass signs there as shown in that picture I will ask you if these are the approximate locations of the signs that were there at the time of this accident, these signs or signs similar to these at that time, were there?
A. Yes sir.
Q. These could be read easily by any one passing across the tracks at that point where the path comes up onto the intersection could they not?
A. Yes sir.

Redirect examination.

By Mr. Bell:

Q. Mr. Malone this sign that's on the Oklahoma railway track just north of the Rock Island is an Oklahoma Railway sign isn't it?
A. Yes sir.
Q. That one that was on the Rock Island do you know whether it was there as it is now at the time this accident occurred, whether it was painted that way?
A. Well they were painted, both of these signs were painted later, but I don't remember just how recently they were painted, but they

came along and put one coat on them and they remained that
81 way for some time before the letters were redrawn on them.
Q. That was after this accident wasn't it?
A. Yes sir I think it was.

Recross-examination.

By Mr. Roberts:

Q. And the signs before they were painted as you say with this one coat had been there for months had they not and in that condition I mean as to the location of them?
A. Yes sir.
Q. The only change that occurred here was a fresh coat of paint to make the signs newly painted?
A. Yes sir.

Redirect examination.

By Mr. Bell:

Q. Was that sign distinct before this accident occurred so you could easily read it?
A. It was dim.

Recross-examination.

By Mr. Roberts:

Q. Could you tell it was a trespass sign?
A. Yes sir.
Q. Could anybody that was passing by there read it and
82 see that it was a trespass sign?
A. I couldn't say.

By a Juror: May I ask the witness a question?
By the Court: Yes.

By a Juror:

Q. Did this train seem to be running faster than the trains you usually observed going by there?
A. Yes sir.

Witness excused.

By the Court: Gentlemen of the jury, it is now 12 o'clock, and we will adjourn court until 1:30 this afternoon. During the noon hour you will be permitted to disperse and go to your homes, but you will observe the admonitions of the court not to talk to anyone about the case nor let anyone talk to you about it, and you are not to make up your minds until you have heard all of the evidence in the case and the instructions of the court. You may be excused. Mr. Bailiff adjourn court.

Thereupon: Court is adjourned till 1:30 p. m. May 17, 1916.

Thereafter: On to-wit May 17th, 1916, at 1:30 p. m., pursuant to adjournment, court was convened, all officers present.

By the Court: Gentlemen, you may proceed, the jury are
83 present.

By Mr. Bell: It is agreed that Eva Cole is the administratrix of the estate of A. W. Roberts, deceased.

By Mr. Bell: Plaintiff offers in evidence City Ordinance No. 1739 as plaintiff's Exhibit B.

By Mr. Roberts: Defendant waives identification of the ordinance and objects to it on the ground that it has not been shown to be effective on the date of the accident, December 11, 1915.

By the Court: The objection is sustained.

By Mr. Bell: I will state that they looked it up and that this is the latest ordinance on it. I will give you my statement on it. Passed October 14, 1914.

By the Court: The objection is sustained.

By Mr. Roberts: With the Court's permission the ordinance may be introduced at this time if counsel for plaintiff will prove the ordinance to have been in effect on the date of the accident.

(Thereupon: Plaintiff's Exhibit B, is admitted in evidence and read to the jury, and is in words and figures as follows, to-wit:)

84 "PLAINTIFF'S EXHIBIT B."

Ordinance No. 1739.

An Ordinance Relating to and Regulating the Speed of Steam Railway Engines and Cars.

Be it ordained by the Board of Commissioners of the City of Oklahoma City, Oklahoma:

Section 1. That it shall be unlawful and an offense for any person, firm or corporation, to run, or assist in running, any steam railway engine or cars within the limits of the district in said city, bounded on the north by the Center of Thirteenth Street, on the east by the center of East Avenue, on the south by the center of Maple Street, and on the west by the center of Klein Avenue, at a greater maximum speed than—Twelve (12) miles—per hour; and it shall be unlawful and offensive in said city to run, or assist in running, any steam railway engine or car outside of said above described district, at a greater maximum speed than—twenty-five (25) miles—per hour.

Section 2. That any person who violates any provision of this ordinance shall, upon conviction, be punished by a fine of not exceeding one hundred dollars for each offense.

Section 3. That sections 694 and 1047, of the Revised General Ordinances, and all ordinances and parts of ordinances in conflict herewith be, and the same are hereby repealed.

Section 4. That this ordinance shall be in full force and effect from and after its passage according to law.

85 Passed by the Board of Commissioners this 14th day of October, 1913.

Signed by the Mayor this 14th day of October, 1913.
WHIT M. GRANT, *Mayor.*

Attest:
[SEAL.] C. R. GOUCHER,
City Clerk.

The City of Oklahoma City.

Mike Donnelly, Commissioner of Accounts and Finance; J. E. Freeney, City Auditor; Jno. E. Dickson, City Treasurer; C. F. Semmelbeck, City Clerk.

May 4, 1916.

I, C. F. Semmelbeck, City Clerk, of the City of Oklahoma City, Oklahoma, do hereby certify that the attached ordinance No. 1739, is a correct and true copy passed by the Board of Commissioners on the 14th day of October, 1913. Commissioners' Journal No. 3 page 47 shows roll call vote on final passage.
[SEAL.] C. F. SEMMELBECK,
City Clerk.

"Plaintiff's Exhibit B."

86 By Mr. Bell: It will be admitted that the point where the deceased was killed was between Klein street and East Avenue, and between 13th street and Maple Street.

Mrs. A. W. ROBERTS, called as a witness on behalf of the plaintiff, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. Mrs. Roberts what is your name?
A. Mrs. A. W. Roberts.
Q. Are you the widow of A. W. Roberts, deceased?
A. Yes sir.
Q. Mrs. Roberts is your husband living or dead?
A. He is dead.
Q. Mrs. Roberts how far do you live from the little grocery called Tremblay's bakery?
A. We just live over on Western Avenue not more than a block and a half I guess, I don't think it is any further.
Q. Do you know what time your husband left on the morning of the injury?
A. Yes sir he left at half after nine o'clock.
Q. Do you know where he was going?

A. He said he was going to the Court house.
Q. Do you know what he was going to the court house for?

87 By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.
By Mr. Bell: I will withdraw the question.

Q. Mrs. Roberts up to the time of your husband's death I wish you would state what was the condition of his health and his ability to attend to his business?
A. His health was good and his ability for his business was good.
Q. What business did he have?
A. He had farming and dealing in stock and purchasing cattle and things of that kind, trading.
Q. He did trading did he?
A. Yes sir.
Q. Did he have a couple of farms?
A. Yes sir.
Q. Did he look after those and manage them?
A. Yes sir.
Q. Was he able to do that at the time of his death?
A. Yes sir.
Q. State whether or not he contributed to your support?
A. Yes sir.

88 Cross-examination.

By Mr. Roberts:

Q. How large were these farms Mrs. Roberts?
A. 160 acres in one and the other was 159 I believe.
Q. 159?
A. I think so.
Q. Approximately is all I want, I don't care for the exact number?
A. Well.
Q. Did Mr. Roberts have any town property in addition to these two farms?
A. Yes sir.
Q. What was that?
A. Sir.
Q. What was that town property?
A. That is our property where we are living.
Q. Did he have any other houses than the one in which you were living?
A. Yes sir.
Q. Where was that?
A. It is on Western Avenue.
Q. Do you know the number of it?
A. No I don't know.
Q. Was it rented?
A. Yes sir.
Q. How many rooms in the house?
A. Five.

89 Q. What he did in the way of business was to collect the rent from this five room house on Western Avenue and run these two farms you spoke of, one about 160 acres and the other about 159 acres is that correct?

A. And trading, he done a good deal of trading.

Q. What kind of trading, do you mean?

A. I mean he dealt in stock, bought and sold.

Q. You had to stock the farm with?

A. Some he had and some he would buy and sell again.

Q. How old was he at the time of his death?

A. Eighty four.

Q. When was his birthday?

A. The 4th of October.

Q. He was eighty four the October previous to his death December 11, 1915?

A. Yes sir.

Q. That's all.

Redirect examination.

By Mr. Bell:

Q. How was his hearing?

A. His hearing was good.

Q. Do you know whether or not there is a path leading across the alfalfa patch before you come to the Rock Island crossing east of Western Avenue?

A. Yes sir.

90 Q. Do you know whether or not that was used by the public?

A. Well we had been going that way for years.

Q. Do other people go over it?

A. Yes sir.

Q. That's all.

Recross-examination.

By Mr. Roberts:

Q. Did you see the trespass signs there on the right of way of the railway company and the electric company?

A. I never did notice them.

Q. You wouldn't say they were not there?

A. Well I never saw them.

Q. That's all.

Witness excused.

91 Mrs. Eva Cole, called as a witness on behalf of the plaintiff, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. State your name.
A. Eva Cole.
Q. What relation were you to Mr. A. W. Roberts, deceased?
A. Daughter.
Q. Mrs. Cole do you remember anything about the pathway that leads across the alfalfa patch leading across southeast to where the Rock Island crosses the Oklahoma Railway Company?
A. Yes sir.
Q. I wish you would tell the jury whether that is a well beaten pathway there or not?
A. There is a well beaten path running diagonally across that field from near the Themblays' bakery to the Railway Crossing. It has been, we have lived there 7 years, and that path has been there seven years that I know of.
Q. State how much that is used by the public in going from Western Avenue down to Oklahoma City.
A. I don't think I have ever been near there but what there were two or three people crossing that. You can always see people coming and going, it is a common roadway.
92 Q. How about with reference to the plainness of that pathway where the alfalfa is?
A. It is extremely plain, just a well beaten track.
Q. There is alfalfa on each side of it?
A. Yes sir.
Q. And dirt in the track.
A. Dirt in the track, yes sir.
Q. Your father, I wish you would state with reference to him, whether he was hard of hearing?
A. He wasn't, his hearing was exceptionally good. We noticed so much in being with the children, he was always talking with the little children.
Q. What was the condition of his health Mrs. Cole at the time of his death.
A. His health was good. He weighed more than he had weighed for thirty years, and we spoke of his health being so good, and we were so pleased with the fact that he was so well.
Q. What about his ability to attend to his business?
A. We often commented on the fact that he was so well able to take care of his business.
Q. What business did he look after?
A. He personally looked after his truck farms, that is he superintended the work of them, and went several times a year, and went out and stood in the fields and himself superintended the

93 work. Just recently, the week before, he returned from a trip up at Deep Fork where he had built a little house for the tenants up there. He was considered an excellent trader and——

Q. That will do, just answer the question. Mrs. Cole are you able to state whether or not your father was able to and did give advice to his wife and children?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, and not a proper measure of damages.

By the Court: Sustained.

By Mr. Bell: Exception.

By Mr. Roberts: I object further on the ground that it is not within the issues raised by the petition.

By the Court: Sustained.

By Mr. Bell: Exception.

Cross-examination.

By Mr. Roberts:

Q. Did you see that path yourself Mrs. Cole?

A. Yes sir occasionally, I nearly always take the car coming down town.

Q. Have you seen the trespass signs at the intersection of the street railway company and the Rock Island Railway Company?

A. I have seen that large sign that was put up since
94 father's death.

Q. Where is that?

A. It is a large sign just near the crossing, just near the railroad crossing.

Q. Which one of these pictures in plaintiff's Exhibit A are you referring to by the large sign?

(Exhibits picture to witness.)

A. I can't state as to which one.

Q. You wouldn't say that both of these signs were not there at the time your father was killed?

A. I wouldn't say that they were not, the sign I refer to wasn't one of the signs there.

Q. Your recollection is not distinct?

A. Yes sir it is very distinct as to the one sign that I have in mind.

Q. And the other one, was it there at that time?

A. I don't know as to the other one.

Q. Well then your recollection is not distinct as to the situation at that time?

A. Yes sir, I saw the large sign, there is a large sign that was put up a month or so I don't know just when it was put up, and I know it was put up after Father's death, because when I saw it it occurred to me that if that sign had been there we would have probably had him with us yet.

Q. You don't know whether it was on the street railway or the Rock Island?

95 A. Yes sir I know it was on the railroad, I remember the street railway sign.

Q. That's all.

Witness excused.

96 CLAUDE ROBERTS, called as a witness on behalf of the plaintiff, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. What is your name?

A. Claude Roberts.

Q. What relation are you to A. W. Roberts, deceased?

A. Son.

Q. What aged man are you Mr. Roberts?

A. Twenty six.

Q. Claude do you know where the pathway is that leads across from Western Avenue across the alfalfa patch?

A. Well I go that way to work almost every morning.

Q. I wish you would tell the jury how much that has been used by the public and how long it has been there?

A. It has been there ever since I can remember. We always used it, and got used to it, and every day I go to work I generally see three or four going and coming along the path.

Q. That's in coming to Oklahoma City business section?

A. Yes sir.

Q. Where do you live with reference to the northwest end of that path?

A. I live about a block and a half, 1114 West 6th, that's just off of Western.

97 Q. Tell the jury the appearance of that path as to plainness and how it is situated?

A. It is very plain here, beaten path, you can see it for about a block or so. It is a good path.

Q. About how wide is it?

A. I would say from two to three feet wide.

Q. The alfalfa on each side of it?

A. Yes, sir.

Q. And the pathway is what, what is it made out of?

A. Just dirt, hard dirt packed down very solid.

Q. Here is a sign up here in this picture in our Exhibit A, C., R. I. & P. Ry. Co.? (Exhibiting picture to witness.)

A. Yes, sir.

Q. I wish you would tell the jury you saw that sign at the time it was put up or directly after it was put up?

A. It wasn't there before the accident. Right after the accident, several days afterwards, they put one up and painted it. Painted all

of them up and down there. I saw them working on it as I wen by to work one morning.

Q. Did they have any other sign there, Claude?

A. I am almost positive they didn't, but I won't say for sure tha they didn't.

By Mr. Roberts: Move to strike the answer.

By the Court: Sustained.

98 Q. Did you see any sign that they had there?

A. No, sir, I didn't see any.

Q. Was this large sign that they have there with C., R. I. & P on it that I showed you was that there at the time your father wa killed?

A. No, sir, it wasn't there.

Q. That other sign there at the right of that, is the Oklahom Street Railway Company sign, isn't it?

A. Yes, sir.

Q. And a person coming down that track towards Oklahoma Cit in a south east direction would any of the letters on the Oklahom Street Railway Company sign be distinguishable to a person?

A. Yes, sir.

Q. Could they see it?

A. They couldn't see it at all.

Q. Coming down the road going south east?

A. Yes, sir.

Q. Do you know anything about your father's ability to work an take care of his business?

A. Yes, sir, his ability was extremely good.

Q. In what way?

A. Overseeing the farms and seeing about the houses and thing and lots of times he helped us out financially.

Q. What was the character of his health at the time of h death?

99 A. It was good.

Q. How was his hearing?

A. Extremely good, as good as any of us here.

Q. Do you remember the date your father was killed?

A. Yes, sir.

Q. Do you know whether or not that was or not a windy day?

A. It was windy and cold, the wind was blowing from the nort

Q. Wind blowing from the north?

A. Yes, sir.

Q. Do you know whether or not your father was a careful man?

By Mr. Roberts: We object to that as incompetent, irrelevant an immaterial.

By the Court: Sustained, calling for a conclusion of the witne

By Mr. Bell: Exception.

Cross-examination.

By Mr. Roberts:

Q. Was that path used only by the people that lived up there, to go to town and not on the return?
A. Well, it was used both ways, I think.
Q. Are you sure of that?
A. Yes, sir, I have seen people going back that way.
Q. Then if people are going backwards towards that path-
100 way will you say to the jury that the trespass sign cannot be seen and read by them?
A. Well, coming to town it can't.
Q. Will you say to the jury that there wasn't some sign or post and board there on the Rock Island?
A. Well, I will say that I am not right sure about that, but if there was one there I noticed one a day or two afterward and it was absolutely impossible to read it.
Q. A board and post were there?
A. Yes, sir, later on it was repainted.
Q. You had noticed these trespass signs then some weeks or months prior to your father's death?
A. No, sir, I hadn't noticed them.
Q. And you walked back and forth along that path?
A. Well, about two thirds of the time, yes, sir.
Q. Did you go back home?
A. Well, hardly ever. I didn't always go back another way. I generally always went to town that way and in going to work, because it was a quick way.
Q. Would you say that opposite to the path going back this way that there were no trespass signs on the other side?
A. On the north side?
Q. No, on the south side.
A. Not that I ever seen.
101 Q. Don't you know as a matter of fact, Claude, that there were four trespass signs there all the time on the Rock Island and the Street Railway crossing?
A. Not that I seen. I never noticed any. I most always crossed the track and went down the track straight east.
Q. This street railway company trespass sign warned people off of the street railway, didn't it?
A. Well, it was up there for that, I guess.
Q. Do you know what it said?
A. I never read it, no, sir.
Q. Didn't it say across the face of it there in pretty big letters, "Safety First"?
A. I am not sure about it, whether it did or not; it probably did.
Q. You never read it?
A. I never read it, no, sir.
Q. It was at the point where the street railway company lines cross the Rock Island lines, as you understand it that your father was struck by the Rock Island train?

A. That's the way I understand it.
Q. On both the Rock Island and the Street Railway Company's property at the crossing?
A. I don't know just where it was, only what I heard.
Q. That was your information?
A. I heard it was right east of the Street Railway crossing, that's what I understood, I don't know.

102 Redirect examination.

By Mr. Bell:

Q. You said something to Mr. Roberts about seeing a sign there a few days afterwards, what kind of a sign was that that you saw that was down?

By Mr. Roberts: He didn't say that.

Q. What was it?
A. I saw a sign that wasn't painted when they were painting it. They either put in a new sign or repainted an old one. That was it.
Q. And it was one of them that wasn't painted there?
A. Yes sir.
Q. That was there at this place?
A. Yes sir.
Q. I will ask you to state whether or not you could read it, was it distinguishable?
A. No sir it wasn't.
Q. And this painted sign you know was put there after your father's death?
A. Yes sir it was put there afterwards.
Q. Did you see them when they were putting it there?
A. Yes sir I saw them working there one morning as I came down to work.
Q. That was after your father's death?
A. Yes sir, that is the reason I noticed it.

103 Recross-examination.

By Mr. Roberts:

Q. Did you try to read that one on the Rock Island right of way?
A. Well I noticed there was nothing to it and there wasn't any use trying to read it.
Q. You didn't try to read that big Safety First sign on the street railway?
A. No sir, not that, I paid no attention to it.

Witness excused.

104 C. O. COLE, called as a witness on behalf of the plaintiff, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. State your name.
A. C. O. Cole.
Q. What relation are you to A. W. Roberts, deceased?
A. I married his daughter, I am son in law.
Q. What is your business?
A. Printer.
Q. Have you ever had occasion before Mr. Roberts' death to observe this path leading from Western Avenue down in a south east direction to the Rock Island line?

By Mr. Roberts: I would like to ask the witness a question.
By the Court: Go ahead.

By Mr. Roberts:

Q. You are the husband of Mrs. Eva Roberts Cole the plaintiff in this case?

By Mr. Roberts: We object to the competency of the witness.
By Mr. Bell: All right.

Witness excused.

105 C. F. SEMMELBECK, called as a witness on behalf of the plaintiff, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. You are the Clerk of the city of Oklahoma City?
A. Yes sir.
Q. You are the same City Clerk that certified to that ordinance, being the ordinance with reference to the running of locomotive trains between Klein and East Avenues and between 13th street and Maple?
A. Yes sir.
Q. That ordinance provides there that the maximum rate of speed is 12 miles per hour, I will ask you whether that ordinance has been repealed or is still in effect?
A. Yes sir it is still in effect.

Cross-examination.

By Mr. Roberts:

Q. Was that ordinance in effect December 11, 1915?
A. Yes sir.
Q. Where is Klein Street Mr. Semmelbeck?
A. It is the first street west of Western avenue.
Q. That's all.

Witness excused.

106 Mrs. EVA COLE, recalled as a witness on behalf of plaintiff, testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. Mrs. Cole I will ask you whether or not you and Sarah Roberts and Claude Roberts and Barnum Roberts are the only children of A. W. Roberts, deceased, living and——

By Mr. Roberts: We object.
By Mr. Bell: I would like to finish my question.

Q. —that Claude Roberts and Barnum Roberts and yourself are the only children and Mrs. Sarah Roberts is the widow?
A. Yes sir.
Q. That's all.

Witness excused.

By Mr. Bell: Please call the Court Clerk Mr. Beatty.
By the Bailiff: Mr. Beaty is not here.
By Mr. Bell: I will rest with the understanding that we can put Mr. Beaty on the stand when he comes.
By the Court: Any objection?
By Mr. Roberts: No objection.

Plaintiff rests.

107 Thereupon: Defendant introduces his testimony, which is as follows:

By Mr. Roberts: Defendant offers in evidence "Defendant's Exhibit 1."
By Mr. Bell: No objection.

Thereupon: Defendant's Exhibit 1 is admitted in evidence and exhibited to the jury, and is hereto attached and made a part hereof, as follows:

(Here follows blue-print marked p. 108.)

CHART

TOO

LARGE

FOR

FILMING

109 E. E. YATES, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. What is your name?
A. E. E. Yates.
Q. You are fireman of the engin*g* hauling passenger train due in Oklahoma City at 8 o'clock or 8:30 regularly, on December 11, 1915?
A. Yes sir.
Q. You are still working for the Receiver of the Rock Island lines?
A. Yes sir.
Q. Where did you take the train or the engine on which you were when you got into Oklahoma City that morning?
A. At Sayre Oklahoma.
Q. You were with the engine continuously from Sayre until it reached Oklahoma City station?
A. Yes sir.
Q. Do you have anything to do with the management of the operation, movement of the engine?
A. Nothing to do with the movement of the engine, no sir.
Q. What are your duties?
110 A. To fire the engine, ring the bell and handling the water, pumping the engine we call it.
Q. Do you remember the occasion of the accident to a man at the intersection of the street railway company and the Rock Island tracks here in Oklahoma City on December 11, 1915?
A. Yes sir.
Q. Tell the jury in your own way as briefly as you can what your position was and what you saw and heard from the time when you got just west of Western Avenue up to the point of the accident.
A. We entered the city in the usual way on that morning, running about something over an hour late, and as we approached Western Street crossing, Union Avenue I believe it is called, the whistle was sounded and again right on Union Avenue as near as I can judge, he sounded the whistle again for the street car crossing.
Q. What is the first street west of the Street car crossing, do you know?
A. The first street they told me is Union Avenue, the first street that's open.
Q. The first street is Western Avenue?
A. Western Avenue I should say.
Q. Is Western Avenue the avenue you referred to as Union Avenue?
111 A. Yes sir, Western Avenue I should have said. I don't know many of the streets here by name.

Q. As you approached Western Avenue just west of the intersection of the Rock Island tracks and the Street Railway Company tracks where were you?

A. I was sitting on the left side of the engine in the fireman's seat box looking out of the window.

Q. In what general direction?

A. Looking straight east watching for a switch engine, as we usually do coming around that curve.

Q. Was the track straight from the point where you took your position until the point of the accident?

A. The Track is straight from the track yard to the point of the accident or little further a distance of three fourths of a mile or more.

Q. It was straight from the point just west of Western Avenue until the accident?

A. Yes sir.

Q. As the engine came on pulling the train toward the scene of the accident what did you see?

A. I saw an old gentleman near the track.

Q. On which side of the track on which you were running?

A. It was on the north side of the track we were on.

Q. Which track were you running on?

A. The south track, main line.

112 Q. How many tracks are there on the Rock Island right of way at the point of intersection just west of there?

A. Three.

Q. What are they?

A. The south track they call the main line and the middle track is the passing track and the other one I believe they call the storage tracy.

Q. That's the north track?

A. Yes sir.

Q. Where was this old gentleman you referred to with reference to the track you were then on, the main line?

A. When I first saw him he was in the act of stepping over the south rail of the middle track.

Q. Where was your engine at that time?

A. As near as I can remember we were about at Western Avenue.

Q. Just about one block west?

A. Yes sir, we were crossing that or just had crossed it.

Q. What did you notice with reference to the old gentleman who was Mr. Roberts?

A. I noticed Mr. Bergole was sounding the whistle at that time and when I saw him the thought entered my mind——

113 Q. Don't tell what you thought, I want to know what you did and what you saw?

A. All right. When I saw him Mr. Bergole was blowing the whistle and I noticed him pause, and he was looking down this way (Indicating) and had a cane in his hand.

Q. Who do you mean, paused?

A. Mr. Roberts and he raised his head something like that way (indicating).

Q. Where was he then?

A. He was right at the south rail of the passing track.

Q. He wasn't on the main line?

A. No.

Q. Was he clear of it?

A. He was clear of the main line.

Q. What distance is the south rail of the middle track from the north rail of the main line on which you were running?

A. I never did measure that but I judge it is about 8 or 9 feet.

Q. All right, proceed.

A. When he raised his head that way and paused I knew he heard the whistle and was waiting for us to pass through, and when we approached him so near we couldn't stop he stepped right ahead of the engine before we could——

Q. Did you give any signal or make any statement to the engineer with reference to the movement of the train or the presence
114 of this man on the track?

A. When I saw him moving toward the track after we had gotten so near I shouted to the engineer who was looking east out of his window, but he evidently didn't understand what I said.

Q. What side of the engine was the engineer on?

A. Right side, on his own seat box on the other side.

Q. The train was coming east?

A. The train was coming east yes sir.

Q. Any other persons in the cab of the engine?

A. No one, no sir.

Q. Did you see the engine strike Mr. Roberts?

A. Yes sir, he disappeared around the front of the engine and I couldn't see him.

Q. Do you know what part of the engine struck him?

A. No I couldn't say.

Q. Do you know whether it was the middle of the pilot or cow-catcher or whether it was the side of the engine?

A. I couldn't say as to that. He had one foot partly over the rail, he wasn't in the middle of the track he had hardly thrown his weight on that foot.

Q. Where was the other foot upon which his weight was?

A. It was just north of the north rail of the main line.

Q. Then as you saw him in that position will you tell the jury whether or not he had ever stepped between the rails of the main track?

115 A. No he never did. He never did get that far. He hadn't time to get that far after we had got so near.

Q. Was any effort made to stop the train?

A. Yes sir, I called to the engineer.

Q. Where was the engine when this effort was first made to stop the train?

A. Well we had gotten quite close to him probably a car length or less.

Q. About what distance in feet?

A. That would be hard to tell, it appeared very close, it couldn't have been over forty or fifty feet.

Q. Do you know what the effort was that was made to stop the train?

A. Yes sir, the effort that was made when I called to the engineer, and it either confused him or he didn't understand what I said or something and he released the brake. If he had understood what I said we would have stopped a little sooner, but he released the brake and I said that will do we have struck a man.

Q. Where was the engine when you said that?

A. We had almost struck him, just about hit him when I said that, and he had pulled the brakes again them but it was too late.

Q. Where was Mr. Roberts at the time the brakes were released by the engineer?

116 A. He was very close.

Q. How close was he to the main line?

A. Well he was in a few feet, he had made a stop, and there is a very little clearance in there, couldn't have been over three or four feet.

Q. With reference to the pilot beam of the engine could you state how close he was to the main track?

A. Probably three or four feet, a person don't have to take but one step to get very near when they are standing that close you know, 8 or 9 feet.

Q. State whether or not as you saw him there where the brakes were released as you stated, a few feet away, he was at a point where he was in the clear of the engine and cars on the main track or not?

A. Yes sir he was still in the clear.

Q. After the effort was made to stop it what happened, did the train come to a stop?

A. Well, let's see, we did—it was about five car lengths I believe.

Q. Do you know how many cars you had on the train that morning?

A. It was either 7 or 8, I disremember.

Q. Did you get off of the engine?

A. Yes sir.

Q. Do you know how many of the cars were across the east street car track when the train stopped?

A. There was about five.

117 Q. How many of them were to the west of the street car track when the track stopped?

A. There must have been two cars. I didn't pay particular attention to those things, but that is as near as I can remember it.

Q. Could you fix for us the position of Mr. Roberts as he was coming southward across the Rock Island tracks at the intersection there?

A. His position at what time?

Q. Just before he was struck.

A. He was looking south.

Q. I didn't ask you that, I asked you his position just before he was struck?

A. Just before he was struck he was standing with one foot on one side of the rail and one on the other.

Q. Rail of what track?

A. The main track, the north rail of the main track.

Q. Where was he with reference to the street car tracks which run north and south?

A. That's a thing I have never been positive about He was either in the middle of the east street car track or just east of the east rail of the east track. That's where I think he was, right east of the east rail of the east track.

Q. How long have you been working for the Rock Island Railroad?

A. A little over ten years.

118 Q. For what other roads?

A. Rock Island exclusively.

Q. What position did you first have?

A. I worked 48 days in the Round House and then have been firing and running an engine ever since.

Q. That has been continuous service has it?

A. Yes sir.

Q. Have you had charge of an engine?

A. Yes sir been promoted over five years, promoted in October 1910.

Q. You are familiar with the running of trains?

A. Yes sir.

Q. You are able to estimate with reasonable accuracy the speed of passenger trains such as you were on that morning?

A. I believe I am, yes sir.

Q. I will ask you to state in your judgment what the speed of the train was prior to the time the brakes were applied as you came eastwards across Western Avenue that morning?

A. He had reduced the speed to probably 12 miles an hour about the usual way we came into the city.

Q. What had been your speed west of that?

A. He probably had run forty miles an hour before we reached the city.

A. I don't mean so far west, I want to know inside of the city limites.

A. When he arrived at the city limits he reduced to 12

119 or 15 miles an hour.

Q. Do you mean that had been your speed since you had been inside the city limits?

A. Yes, sir.

Q. Had there been any application that you know of with reference to the control of the speed?

A. Yes, sir, he had reduced the speed of the train.

Q. Have you made these applications?

A. No, sir, the engineer did it, I had nothing to do with it.

Q. Do you know whether or not there had been any other method

of controlling the engine made prior to the time of the accident other than the application of the brakes?

A. I don't hardly understand that question.

By Mr. Roberts: Strike the question, please.

A. Had there been any effort you say to control the engine?

Q. I will ask you another question, I think you stated a moment ago that the train was reducing its speed as it approached the Oklahoma Street Railway car crossing?

A. Yes, sir.

Q. Do you know what caused that?

A. Yes, sir.

Q. What?

120 A. It is what we call a reduction of the train pipe, causing air to flow from the reservoirs in each car into the brakes allowing the brake to go against the wheel.

Q. Anything else?

A. No, sir.

Q. I will ask you if in your judgment anything could have been done that was not done to avoid the accident to Mr. Roberts after he was seen, with his foot partly over the north rail of the main track upon which you were running?

By Mr. Bell: Objected to as calling for a conclusion of the witness.

By the Court: Overruled.

By Mr. Bell: Exception.

A. There was nothing could have been done.

Q. You stated on direct examination with reference to your duties that it was your duty to ring the bell?

A. Yes, sir.

Q. Were you ringing the bell on this occasion?

A. Not on this occasion, no, sir, for the reason that the bell was ringing, I wasn't ringing it for the reason that it was being rung at this time by the automatic ringer. When it is out of commission I ring it with the cord.

Q. Who controls the automatic ringer of the bell?

A. The engineer.

121 Cross-examination.

By Mr. Bell:

Q. It was cold that morning, wasn't it?

A. Yes, sir.

Q. Wind was blowing from the north?

A. Wind nearly from the north.

Q. Mr. Roberts had his hand up to his face, didn't he, at the time you saw him?

A. I don't remember seeing him with his hand to his face.

Q. You don't remember that?

A. No, sir.

Q. But you do remember seeing him standing facing south?
A. I do.
Q. With a stick in one hand, which hand was the stick in?
A. I believe I saw that stick in his right hand if I remember right.
Q. At that time your train was coming from the west?
A. I believe so.
Q. A little north of west?
A. Yes, sir, a little.
Q. And he was facing south?
A. Yes, sir.
Q. Wasn't he really facing towards the business section of the town here?
122 A. South, yes, sir.
Q. Now, then, in other words, as he was standing something n this direction (indicating) facing Oklahoma City the business sec- ion of Oklahoma City, your train was coming from the west and a ittle north of west, wasn't it?
A. It seems to me that the tracks cross almost straight that way indicating).
Q. The track runs something like this, doesn't it, a little south east, omes a little from the north west (indicating)?
A. Let's see, that's the Rock Island track.
Q. Yes.
A. And here is the street car track (indicating on defendant's xhibit 1).
Q. As he was standing facing toward the business section of Okla- oma City you *you* saw him looking down this way (indicating)?
A. Yes, sir.
Q. And as you got about Western Avenue you saw him look up hat way (indicating)?
A. Yes, sir.
Q. In the same direction he was holding himself?
A. Looking south right down the street car track.
Q. Then he didn't look around at your train?
A. I didn't see him look towards the train, no, sir.
Q. Now, then, that occurred when you were about Western 123 Avenue?
A. Yes, sir.
Q. Do you recognize this Exhibit A of ours with reference to the Oklahoma Railway tracks and the Rock Island tracks along there (presents witness Exhibit A)?
A. Yes, sir.
Q. Western Avenue coming along here (indicating)?
A. Yes, sir.
Q. This is the alfalfa patch over here?
A. Yes, sir.
Q. The path leading up to the north west there?
A. Yes, sir.
Q. You have seen the pathway, have you?
A. Yes, sir.

Q. Well, now, you knew that that pathway was over there on the north side of the track leading up through that alfalfa patch?

A. I have seen it.

Q. You knew people walked along there?

A. I know they walk near the tracks in a great many places.

Q. How far is it from Western Avenue down there to where he was at the time he was injured?

A. It is a city block.

Q. About how far is it to the block?

A. About three hundred feet, I guess.

124 Q. About three hundred feet, at that time, at the time you saw him then facing toward the business section of Oklahoma City, didn't you, looking in that direction in the main direction of that path here, didn't you call to the engineer that there was a man liable to cross there or anything of that kind?

A. He was in the clear, I didn't.

Q. You do know he wasn't looking up at you and didn't turn toward you?

A. I didn't see him turn toward me.

Q. There wasn't any box car or anything of that kind *go* obstruct your view?

A. No, there wasn't any cars along there.

Q. Between him and the pathway or anything of that kind, it is your duty to look out for people, isn't it, on or near the tracks of your side?

A. Yes, sir.

Q. And if there is any danger it is your duty to notify the engineer, isn't it?

A. Yes, sir.

Q. And have him to stop the train if in your judgment it is necessary?

A. Yes, sir.

Q. Well, now, if you had called to the engineer as this old man was standing looking in this direction, as it crossed Western Avenue you could have stopped that train before it got to him, couldn't you?

A. Yes, sir.

125 By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness.

By the Court: He has answered the question.

A. I believe he could have stopped.

By Mr. Roberts: Note our exception.

By the Court: He has answered the question.

By Mr. Roberts: We move to strike the answer of the witness and the statement he made before objection could be made to the question.

By the Court: Don't answer quite so quickly.

A. All right.

By the Court: The motion is overruled.
By Mr. Roberts: Exception.

Q. Isn't it a fact that you could have stopped that engine in a hundred feet?

By Mr. Roberts: We object, calling for a conclusion of the witness, incompetent, irrelevant and immaterial, the conditions under which the stop was made not being stated.
By the Court: Sustained, no time or place having been set.

Q. At the time I was asking about Western Avenue, at the time you saw him when you were crossing Western Avenue on this train couldn't you have stopped the engine or had the engine stopped in a hundred feet, and didn't you so state in your testi-
126 mony at the inquest proceedings?

By Mr. Roberts: Objected to as being double in form.
By the Court: Sustained, impeaching question and no proper foundation having been laid.

Q. I will just ask you that question, isn't it a fact that you could have stopped this engine when it was at Western Avenue, or had it stopped, within a hundred feet?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.
By the Court: Overruled.
By Mr. Roberts: Exception.

By the Court: Have you got the question?
A. Yes sir, he asked me if he could stop within a hundred feet.

By Mr. Roberts: Let the stenographer read the question to him.
By Mr. Bell: If the man understands it there is no use for him to read it.
By the Court (to the Reporter): You may read the question to the witness.

By the Reporter (reading): Question. I will just ask you that question, isn't it a fact that you could have stopped this engine when it was at Western Avenue, or had it stopped, within a hun-
127 dred feet?
A. No.

Q. Didn't you state at the inquest after you stated that you were in a hundred feet away from him when you saw him, didn't you state then, I could have hollered to the engineer and probably had the train to stop, referring to the time after you first saw him at Western avenue?

By Mr. Roberts: Objected to as in no way contradicting the witness at this time.
By the Court: Sustained, no proper foundation having been laid.

Q. How close were you to him at that time?

By Mr. Roberts: Objected to as indefinite.

Q. I will ask you this, I want to get the connection, I want to ask you if you didn't state that you saw him a hundred feet before you struck him and didn't you state, were asked these questions and these answers were made, how close were you to him at that time?

By Mr. Roberts: I want to object to each and all of these questions.

Q. Answer. I don't know how far it is in there, probably a hundred feet?

By Mr. Roberts: Objected to as indefinite and including two questions. And no proper foundation for impeachment.

128 By the Court: Sustained, indefinite.

By Mr. Bell: I don't want to have to go over all the testimony, I am just going on this proposition.

By the Court: I can't understand the record.

Q. I will ask this question, wasn't this question asked you, probably 100 feet away from him when you first saw him there, and didn't you answer yes, when I first noticed him near the track?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial and no proper foundation having been paid and not contradicting witness in this trial.

By Mr. Bell: I asked if it was at the inquest proceedings here in Oklahoma city, two days after the accident occurred when he was questioned by Judge Hooker, the county attorney.

By the Court: The objection is overruled, the further foundation having been laid.

By Mr. Roberts: Exception.

Q. Didn't you answer that in answer to the question probably a hundred feet away from him when you first saw him there, and you answered, yes when I first noticed him near the track?

A. I answered a question that I could have stopped when I first saw him, yes, up near Western Avenue.

Q. That you could have stopped before you struck him?

A. Yes sir when I was near Western Avenue I could, yes.

129 Q. Now then Mr. Yates when you see that a person does not notice you and he is near the track and going towards the track in a case of that kind, it is your duty to notify the engineer isn't it, to look out?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, and involving a statement of the law as to what his duty is under the circumstances which the court will instruct.

By the Court: Sustained as calling for a conclusion.

Q. You testified in answer to questions by Mr. Roberts as to what your duties were, to look out ahead——

By Mr. Roberts: Objection.

Q. That's a fact, it is your duty to look out ahead?
A. Yes sir.
Q. You did state it was your duty to keep a look out ahead?
A. Yes sir.
Q. And you did do that?
A. I did.
Q. Well now when you do keep a look out ahead and see a man that is perhaps unconscious of the fact that the train is coming, and that he is near the track and is liable to get on the track, then it becomes your duty to notify the engineer isn't it?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial and calling for a concluusion.
130 By the Court: Overruled.
By Mr. Roberts: Exception.

A. No it isn't my duty to notify the engineer if I see him anywhere near the track, because that occurs every day.
Q. I didn't ask you that Mr. Yates, I said when you see a person coming towards the track and he is liable to be in a place of danger and is liable to get on the track, then isn't it your duty——

By Mr. Roberts: Objected to as a hypothetical question not based on the evidence, and calling for a conclusion of the witness, incompetent, irrelevant and immaterial, and involving a question of law.
By the Court: I take it that when counsel examined him concerning a rule, he was calling for a rule of the company.
By Mr. Bell: Yes sir the rules of the employees of the company.
By the Court: The question of duty is a legal conclusion, a rule is not. If you are inquiring about rules, I take it that counsel *that counsel* used the word rule, did you use the word rule?
By Mr. Roberts: I don't know whether I did or not.
By Mr. Bell: I will say his duty to the company.
By the Court: If the company has a rule it is competent.
131 Read the question.
By the Reporter (reading question): I didn't ask you that Mr. Yates, I said when you see a person coming towards the track and he is liable to be in a place of danger and is liable to get on the track, then isn't it your duty——

Q. I will ask you this, when you see a man you as fireman see a man coming towards the track and near the track and see that he does not recognize your approach and that he is liable to step on the track before you get to the place, isn't the rule of the company that you shall notify the engineer and have him stop the train or slow up the train under these circumstances?

By Mr. Roberts: Objected to as not a fair statement of the evidence in this case, incompetent, irrelevant and immaterial and calling for a conclusion of the witness.
By the Court: Overruled.
By Mr. Roberts: Exception.

A. We have no instructions to that effect, and no written code that I know of.

Q. What is your custom in a case of that kind?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled.

By Mr. Roberts: Exception.

132 A. Our customs are in a case of that kind where a man is near the track is to keep on going because that is so often there are men walk in the clear that never notice the bell ringing or the whistle blowing.

Q. Then because they frequently do not notice it is it your custom to just run on and run over them?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, and an improper question.

By the Court: Sustained.

Q. What did I understand you to say, that it is so often that they don't notice the bell ringing or the train approaching, therefore you don't stop, did I understand you to say that?

A. It is so often that they are near the track and don't look towards the engine that we can't stop every time we see a person within ten or twenty or thirty feet from the track, we don't stop.

Q. Now then, you say at the time he was struck he had one foot over the north rail and the other on the north side of the north rail did he?

A. Yes sir.

Q. Did you see him in that situation?

A. Yes sir.

Q. Well how soon, how close can you be to a man who is on the track before he gets out of your sight on the track on account
133 of the engine being in front of him when you are fireman?

By Mr. Roberts: Objected to as calling for a conclusion of the witness, upon facts which are not definite enough for an answer.

By the Court: Overruled.

By Mr. Roberts: Exception.

A. A tall man I believe can be seen standing on the end of the ties, judging from the seat box I believe he can be seen on up until we are almost probably right on the rail he gets out of sight. It seemed he stepped around just out of my sight when he was struck.

By Mr. Roberts: The defendant moves to strike the answer of the witness from the record, because the question does not state and the answer does not show whether or not it is on the same side of the engine or the opposite side of the engine to the position of the person observing it.

By the Court: Overruled.

By Mr. Roberts: Exception.

Q. I didn't get your answer. I want to know how far he would have to be in front of the engine under these circumstances before he would pass out of your view where he was walking along on your side.

A. He passes out of my view about at the north rail going east.

Q. How far in front of the engine, that is what I want to
134 know, how far would he be on the track in front of the engine before he would pass out of your view if you are on the engine going toward him?

A. That would be hard to state.

Q. Say he was standing with one foot over the rail and the other back this way (indicating) how far would the engine be before he would be out of your view?

By Mr. Roberts: Objected to unless it is limited to the engine on which the witness was at this time.

Q. With this engine?

A. That engine, No. 1307 the engine we had that day we would be within, it is a matter of guesswork, but we would be within five or six feet.

Q. Five or six feet of the engine?

A. Yes sir he would go out of view probably standing on the north rail.

Q. Now then you stated to Mr. Roberts as I understand it that you didn't call to the engineer until you were in about five or six feet of him did you?

A. I didn't state that.

Q. What did you state?

A. It was about a car length I think I said.

Q. You was a car length from him before you called the
135 engineer?

A. Yes sir.

Q. When you did call to the engineer the engineer released the brakes in place of putting them on you say?

A. Yes sir, he didn't understand me.

Q. Made it go faster?

A. He didn't make it go faster, no sir.

Q. Don't releasing the brakes make the train go faster?

A. No sir.

Q. Cause it to go slower?

A. No, the speed has already been reduced.

Q. I understand, but the train wasn't stopped was it?

A. But there is nothing to make it go faster.

Q. You have the brakes on and the engine pulling?

A. Yes sir.

Q. Then if you will release the brakes it don't make it go any faster?

A. No sir.

Q. In other words it would be just the same as if the brakes was on?

A. It don't pick up speed, but it ceases to slow down.
Q. Your train was going the same speed for some little distance wasn't it?
A. Practically the same speed.
136 Q. How far—you said probably twelve miles per hour, how far was it going probably twelve miles per hour?
A. Well from twelve to fifteen miles per hour, about a quarter of a mile I suppose.
Q. About a quarter of a mile it is going probably twelve miles per hour, and the reason the speed was reduced was it had the brakes on?
A. Yes sir.
Q. What are the brakes on for?
A. To reduce the speed.
Q. Why did you take them off during that half a mile, it would have been just the same wouldn't it?

By Mr. Roberts: Objected to as argumentative.
By the Court: Overruled.
By Mr. Roberts: Exception.

A. They were not on all that time.
Q. I understand that they were off just as you got to Mr. Rogerts, why did you put them on and why do you take them off?
A. Put the brakes on to reduce the speed.
Q. What did you release the brake for?
A. He released the brake just as I called to him having his hand on the brake, he released it just at that time because he had the train slowed enough to go through the city limits and he was going
137 to let it drift on down to the station and just as he released it I called to him and he said what, and he was leaning way out of his window.
Q. The engine was pulling you say?
A. No I didn't say it was pulling.
Q. I understood you to say a moment ago?
A. I don't know what you mean by pulling.
Q. Was the engine pulling the train?
A. No sir.
Q. Hadn't been for a quarter of a mile?
A. Yes sir didn't work steam for quite a ways.
Q. For a quarter of a mile you had the brakes on and it wasn't pulling, was it coming down hill?
A. No sir.
Q. And wasn't coming down hill and still it didn't stop?
A. No sir.

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

Q. Now this same speed of probably twelve miles per hour continued for a quarter of a mile didn't it?
A. About that distance.
Q. Did you have anything to call your attention up to the time the accident occurred to what the speed was on that train?

A. Did I have anything to call my attention?
Q. Up to the time this accident occurred as to what the speed was back there?
38 A. There was nothing anywhere occurred to call my attention to anything.
Q. You are just testifying as to what the custom was?
A. As to what the custom is and what I recollect of that particular time, there was nothing anywhere we reduced the speed when we entered the city.
Q. You don't know what speed he was running do you?
A. No one else knows accurately.
Q. All you can testify to is what your custom is and what you remember of this case?
A. That's all anyone can.
Q. You don't know any more about what the speed was on that day than it was on other occasions just before you got down there to you?
A. No, no one can tell exactly.
Q. You wouldn't swear of your own knowledge that that train was not going more than twelve miles an hour would you, of your own personal knowledge?
A. It might vary from that. I couldn't, no sir. It might be more or less.
Q. How long have you been running on this road Mr. Yates?
A. I have been on the railroad on this division for a little over ten years.
Q. Running through Oklahoma City?
A. Not continually, I have worked east out of Shawnee some time.
39 Q. When you are going through the city it is the rule and custom of the employees to keep more of a look out than when they are going through the country isn't it?
A. Always.

By Mr. Roberts: Objection.

Q. Isn't it a fact also that where you know that there is a frequented track going across the right of way and you know the public is liable to use that, that it is your custom and rule to keep a better lookout in case of that kind when you pass?

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial and not within the issues in this case.
By the Court: What was done in this particular case is material.
By Mr. Bell: Exception.
By the Court: Unless you mean to prove a duty by a custom, then would be material. What was done in this particular case is material. If you want to prove a duty you will allege custom and prove custom, but it is immaterial as to what has transpired in the past.
By Mr. Bell: If this gentleman knew that the public constantly used this place and he was accustomed to take notice of the fact that

the public was using this place, then it becomes incumbent upon him especially to look out for him.

140 By the Court: That is not the question. Read the question.

By the Reporter (reading): Question, isn't a fact also that where you know that there is a frequented track going across the right of way and you know the public is liable to use that, that it is your custom and rule to keep a better lookout in case of that kind when you pass.

By the Court: The objection is sustained.

By Mr. Bell: Exception.

Q. Isn't it a fact Mr. Yates that in a case like this where the, like this one here that occurred in the case of the death of Mr. Roberts, where the public roadway is lying across the track and the public uses that track in the city, isn't it a fact that it is your rule and custom to keep a greater lookout there for the people, and use greater precautions to prevent their injury.

By Mr. Roberts: Objected to as calling for a custom generally and not as to this particular time and place or this particular crossing, incompetent, irrelevant and immaterial.

By the Court: Sustained.

By Mr. Bell: Is it because it is not sufficiently specific or what ground?

By the Court: The objection is sustained as made by counsel.

141 By Mr. Bell: Exception.

Q. Isn't it a fact Mr. Yates that when you are coming along this place here where this accident occurred knowing as you state that the public uses this pathway across there, that it is your rule and custom to use a greater lookout for those approaching and crossing the track than you would at other places?

A. It is our custom to look out at all public highways.

By Mr. Bell: We move that the answer be stricken as not responsive.

By the Court: Sustained.

Q. Answer the question as I gave it to you, is it true or not, yes or no?

By the Court: Read the question.

By the Reporter (reading): Question, isn't it a fact Mr. Yates that when you are coming along this place here where this accident occurred knowing as you state that the public uses this pathway across there, that it is your rule and custom to use a greater lookout for those approaching and crossing the track than you would at other places?

A. I don't see how I could answer that yes or no, when I really don't know that that was a public highway or that people used that any more than they do any other part of the right of way.

142 By Mr. Bell: Move to strike the answer as not responsive.
By the Court: Overruled.

Q. What is your answer then as to whether or not you do do that?
A. Whether we used any extra precaution at that point?
Q. Yes.
A. I can't say that we use any extra precaution at that point any more than we do at any other place along there, we are looking out all the time.
Q. Now then where was it that your train was going forty miles an hour that you testified to?
A. That was way out at the brick yard, near the brick-yard.
Q. How far is the brickyard from Western Avenue?
A. I don't know, it is three quarters of a mile probably or a mile, something like that.
Q. When did you get the speed reduced down to 12 miles per hour after leaving the brickyard?
A. It was along west of Western Avenue there some place I can't say exactly where, as we approached there just west of Western Avenue.
Q. Was it a hundred yards west of Western Avenue where you got it reduced?

By Mr. Roberts: He said he couldn't locate it correctly.

A. I can't say of course just where it was.
Q. On Klein just next, did you get it reduced as low as
143 twenty five miles on Klein?
A. Yes sir we were that low.
Q. Now the next is McKinley I believe, did you get it reduced to twenty-five miles at the next street?
A. We were slower than that it seems. We were entering the city, right there is where he brings her down to about 12 or 15 miles an hour.
Q. You haven't any speedometer or anything of that kind have you that shows what speed it is going?
A. No sir, it is just about——
Q. Was your train on time that day?
A. No sir.
Q. How much was it off?
A. Let's see, we arrived here about 9:40, we were about an hour and thirty minutes late, something like that.
Q. Now then you spoke about the whistle blowing, do you have a personal recollection about each whistle that blows for each crossing here as you come into Oklahoma City, each street?
A. Do you mean do I recollect them all the time?
Q. Yes.
A. I can't recollect all. No.
Q. You don't recollect all the time?
A. No sir.
Q. Do you know of your own personal knowledge Mr. Yates

whether that whistle blew at McKinley street as it crossed it that day?

144 A. I know it did. I never was surer of anything in my life.

Q. As it crossed McKinley?

A. He blew at each one of these crossings.

Q. You don't know where McKinley is?

A. He blew at all of them.

Q. Have you got a personal recollection of that or are you talking from custom?

A. No sir I am not talking from custom.

Q. After you crossed and started above town did he blow for each one of the streets?

A. After he left going east do you mean?

Q. Yes after he left the depot going east did he blow for each one of these crossings?

A. Yes sir.

Q. You have a personal recollection of that too do you?

A. I can't say positive I have a personal recollection for every street crossing.

Q. A while ago you said you had as to west of this place, isn't it a fact that you haven't a personal recollection of Western Avenue and McKinley and all of these streets?

A. I have a personal recollection that he blew the crossing signal at least three times along there.

Q. Do you know how many streets are west of Western Avenue then as you come into Oklahoma City?

A. No sir I didn't count them.

Q. You don't know which street he blew at?

145 A. I know he blew at Western Avenue and the street west of that and he was blowing for the street car crossing as he crossed Western Avenue.

Q. Your recollection is now he just blew two of them that was Western Avenue and the next one?

A. I said at least three.

Q. And then one where the street railway line is?

A. I said at least three.

Q. That would make the three wouldn't it?

A. Yes sir.

Q. You have a personal recollection of this?

A. Yes sir.

Q. What is it that called your attention to the fact that he blew for these three when you don't know whether he blew for the one beyond that or not?

A. He blew the whistle unusually loud and long on that particular occasion. why he did it I don't know, ask him.

Q. For which street?

A. These streets just west of there.

Q. Isn't it a fact that when you called his attention to the fact that he had struck a man that he blew the whistle then?

A. It is not.

Q. When you called his attention to the fact that he had struck a man didn't he then blow the whistle?

A. He didn't.

146 Q. Are you certain about that?

A. I am.

Q. What did he do?

A. He released the brake when I first hollered and then he set it again immediately.

Q. How come him to set it?

A. Because I told him to.

Q. When you told him he had hit a man?

A. Yes sir.

Q. That was after he had hit him you told him to set the brake?

A. No it was just, we were right at him at the time I told him that.

Q. He released the brake you would judge in about a few feet of him when he released the brake?

A. Yes sir.

Q. Then what did you say to him?

A. I said that will do, that is the term we use when we want to stop.

Q. You said that will do when he released the brake didn't you?

A. Yes, but I repeated it.

Q. He had to work the brake to do that didn't he, the beam, isn't that a fact?

A. I don't understand your question.

Q. Did he have to work that beam or whatever you call it in order to release the brake?

147 A. He had to move the brake valve.

Q. What did he do?

A. Just a stroke of the hand.

Q. Just a stroke of the hand?

A. Yes, sir.

Q. And then after you said that will do and he released it, what did you say next?

A. I said that will do, we hit a man, about that time we hit him.

Q. About that time you hit him and he then put them on, did he?

A. Yes, sir.

Q. So then he put them on after you had hit the man?

A. Put them on the second time just about the time the lick was struck, yes, sir.

Redirect examination.

By Mr. Roberts:

Q. Mr. Yates, your statements with reference to the position of the man disappearing from your view about the distance in front of an engine that he disappears from your sight, refers to a man on the same side of the engine as you are, or does it refer to the opposite side?

A. Same side is what I referred to. My judgment may be poor.

Q. Your estimates with reference to speed are estimates
148 or judgments and not correct data?
A. No, not correct, I have no way of being correct.
Q. You offer them for what purpose?

By Mr. Bell: Objected to.

Q. You offer them as what?

By the Court: Answer the question.

A. I offer them as what?
Q. You offer your estimates of speed as what?
A. As approximately the speed that we were running as near as a human can tell by guess.
Q. That's all.

Witness excused.

149 J. J. BERGOYLE, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. State your name?
A. J. J. Bergoyle.
Q. You were engineer working for the Receiver of the Rock Island on December 11, 1915, at the time Mr. Roberts was killed?
A. Yes, sir.
Q. You were engineer on train 44 on that morning?
A. Yes, sir.
Q. Where did you take that train?
A. Sayre, Oklahoma.
Q. You operated it on through and left it at what point?
A. Shawnee, Oklahoma.
Q. On the morning of the accident?
A. On the morning of the accident, yes, sir.
Q. As you came towards the intersection of the street car crossing and the Rock Island crossing at what is Ollie Street in Oklahoma City did you see any person approaching from either side of the track at that intersection?
A. No, sir.
Q. When did you first learn of anyone being in close
150 proximity to the track?
A. When the fireman made an alarm to me.
Q. About where was your engine then with reference to the crossing or intersection of the street railway tracks and the Rock Island tracks?
A. I guess it was right on the street car crossing.
Q. How long have you been working for railways Mr. Bergoyle?
A. Twenty one years next February.

Q. What positions have you occupied?
A. Locomotive engineer the last twenty years.
Q. What prior to that?
A. Fireman.
Q. How long?
A. About two years.
Q. What prior to that?
A. About — years an engineer, second time in service. About 26 years in service.
Q. You have been familiar with the running and speed of engines and trains during that period?
A. Yes, sir.
Q. I will ask you to state to the jury in your judgment what the speed of that train was on the morning of the accident as you approached the intersection of the street railway tracks and the Rock Island tracks where the accident occurred?
A. The same as usual, ten or twelve miles an hour.
151 Q. Had there been any reduction of speed prior to that time?
A. Yes, sir.
Q. About where did you begin this reduction, if it was made, and what did you do to reduce it?
A. I applied my air brakes below the city limits.
Q. About how far from the intersection of the street railway tracks and the Rock Island was that if you know?
A. It must have been over a thousand feet, fifteen hundred feet.
Q. Yards?
A. Yards, yes, sir, it is down about the waterworks swich as we call it.
Q. How far is that from the brickyard?
A. That's east of the brickyard a mile or more.
Q. Were you working the steam all the way through?
A. No, sir.
Q. Where did you cease to work it?
A. I eased the engine off and was drifting from the brickyard into Oklahoma City.
Q. About how far from the intersection of the street railway tracks and the Rock Island tracks is the brick plant where you say you shut off steam?
A. It must have been half way I guess, or more.
Q. Any notion of the number of blocks Mr. Bergoyle?
152 A. Well, I generally shut off about that first street crossing east of the brickyard.
Q. You didn't answer my question. You have any notion of the number of blocks it is from the intersection of the street railway to the brick plant?
A. To the brick yard out west of town?
Q. Yes.
A. It is over a mile or more.
Q. Am I correct in understanding you to say then that you had shut off steam there and been drifting eastward from that point?

A. Yes, sir.

Q. Did you make any effort to stop your train as you approached the intersection of the street railway tracks with the Rock Island tracks at Ollie Street?

A. I was reducing speed to about 12 miles an hour.

Q. What effort did you make to stop the train?

A. To stop it?

Q. Yes.

A. I didn't get your question.

Q. Did you make any effort to stop the train as you approached the intersection of the Rock Island and the street railway tracks?

A. No, sir, not until I got a warning to stop.

Q. Where did you get that warning?

A. From the fireman.

Q. Where was the engine at the time the fireman gave you the warning?

A. On the street railway crossing.

153 Q. Had you then or not struck Mr. Roberts?

A. I don't know, I didn't see Mr. Roberts at all.

Q. What did you do when the fireman gave you the warning and what was the warning?

A. I was looking out of the window and looking ahead up towards the Frisco connection the elevator and the street car approaching me and that drawed my attention. I had my head out of the window and when he hollered out and I looked in and he looked up and from the expression of his face I seen there was something on and I says what and he says hit somebody and I released my air and I says hit somebody and he says yes and I threw it on again and stopped.

Q. About what rate of speed were you running in your judgment when you released the air and threw it back on?

A. About ten or twelve miles an hour.

Q. You say you were at about what point when that occurred?

A. Right on the street railway crossing.

Q. Which one, the west or east one?

A. That's hard to answer, but I guess it was the east crossing.

Q. You said something about a street car where was that?

A. The street car approached me from the south side coming from town and going out to the outskirts of town.

154 Q. Where did you first see this street car, where were you?

A. As I seen it it came out from behind the buildings.

Q. Where was the engine upon which you were when you first saw that street car.

A. We was about a hundred feet west of the street car crossing.

Q. What did the street car do?

A. Stopped as usual.

Q. Where?

A. Right at that stop board they have right there where the words no trespass are on it.

Q. How far from the track upon which your train was running did the street car stop?

A. Well I guess it must have been 15 or 20 feet.
Q. In which direction?
A. Going north.
Q. In which direction was the car the 15 or 20 feet which you say it was from your train north, south, east or west?
A. It was east of the train, east of my train.
Q. 15 feet east of your train?
A. Yes sir.
Q. How far was it south of your train?
A. I guess 15 feet.
Q. Do you mean it was 15 feet east of your train?
A. That is where they came out from behind the buildings
155 and stopped, when they stop a flagman goes ahead to flag them across the railroad crossing.
Q. Were they ever at any time directly ahead of your train?
A. I don't understand you.
Q. Was the street car at any time ever directly in front of your train?
A. No sir they both got there about the same time.
Q. You saw it as it came up from the south and came to a stop?
A. As it came out from behind the buildings, yes sir.
Q. How many seconds did it take or had it come to a stop at all when you reached it?
A. Well I guess that wouldn't be over 5 seconds.
Q. After the fireman gave you the warning, whatever it was he said, and you saw the expression on his face, would there have been any means at your command which you could have used and stopped that train before it reached the point where Mr. Roberts was struck?

By Mr. Bell: Objected to as presupposing matters which are not in evidence, because he said that the man was already struck at that time.
By the Court: Overruled.
By Mr. Bell: Exception.
By the Court: Read the question.

156 By the Reporter (reading question): After the fireman gave you the warning, whatever it was he said, and you saw the expression on his face, would there have been any means at your command which you could have used and stopped that train before it reached the point where Mr. Roberts was struck?
A. I don't hardly understand that question Mr. Roberts. Of course when I got the alarm I stopped just as quick as I could.
Q. Just answer the question, don't talk until you are asked. After the fireman gave you warning could you have stopped the train in the shortest time, or a shorter distance than you did?
A. No sir.
Q. Was there any means at your command which you didn't use in attempting to stop that train after that warning was given you?
A. None at all.

Q. Do you know how many cars you had on the train that morning?

A. We had the regular train, eight cars.

Q. Do you know what the position of the cars were when the train stopped at the crossing?

A. I think the rear end of the fourth car was on the street car crossing.

Q. Did you leave the engine?

A. No sir.

157 Q. You don't know of your own knowledge exactly the position of it?

A. No sir.

Q. What was the number of the engine you used that morning?

A. Number thirteen O Seven.

Q. Do you mean one thousand three hundred and seven?

A. Yes sir one thousand three hundred and seven.

Q. What had you done Mr. Bergoyle with reference to the signals, either blowing the whistle or ringing the bell as that train approached the intersection of the street car tracks and the Rock Island at this point?

A. I whistled at all crossin-s and whistled at that crossing. My automatic bell ringer is ringing from the time I leave Council until I get to Higarty.

Q. Was your bell ringing as you reached the intersection?

A. Yes sir.

Q. Do you know whether or not the last whistle was blown prior to your arrival at the intersection?

A. After I left that street where the flagman is, I think you call it Western Avenue.

Q. How far west of the intersection, how many blocks?

A. It couldn't have been over two hundred feet, or three hundred feet, and I am pretty sure I was whistling right at the time the accident occurred.

158 Q. Was there any street between the intersection of the street railway tracks and the Rock Island tracks and this street which you *saw* was two or three hundred feet west.

A. There were no street, no sir.

Q. You say you never saw this man before the accident?

A. No sir.

Q. That's all.

Cross-examination.

By Mr. Bell:

Q. Mr. Bergoyle were you running your train at the same rate of speed that you always run as you are coming along there?

A. Yes sir.

Q. And you are merely testifying in this instance to what your custom was on matters of that kind are you not?

A. Yes sir.

Q. You don't have any personal recollection of looking out to see exactly what speed your train was going do you?
A. No sir I have my time to go by.
Q. You have your time to go by, you were about an hour and a half late that day weren't you?
A. Yes sir.
Q. Had to make up a little time didn't you?
A. Yes sir.
159 Q. Now Mr. Bergoyle the facts of the case are when Mr. Yates said that will do I believe you stated you were right on the railway tracks, that intersection at that time?
A. Yes sir.
Q. And when he just said that you released the brakes?
A. Yes sir.
Q. What did you do after that?
A. I was reducing speed and watching ahead there and it is always customary for an engineer to stand there with his hand on the brake valve whenever we have a very dangerous curve ahead of us there we are always looking around there expecting to find a switch engine ahead of us.
Q. What made you release the brakes? You had the brakes on and were trying to control the speed?
A. I was down to 12 miles an hour and I didn't know what he was doing. I knew I was right and the road was clear and I seen the expression on his face and I says what and he says we hit somebody and I says hit somebody and I (indicating) we call it big-holed it.
Q. You put the brakes on?
A. Yes sir.
Q. What effect does releasing the brakes have on a train?
A. Just letting the train drift.
Q. While the brakes are on it slows up?
160 A. Yes sir.
Q. Let them off it would go faster?
A. No sir.
Q. I say it would go faster than it would if the brakes were on wouldn't it?
A. No sir if the brakes were on it would stop the train.
Q. Did you have the brakes on when you got down there?
A. I had it on reducing speed yes sir.
Q. Then you took the brakes off?
A. Yes sir.
Q. A train will go faster when the brakes are off than when the brakes are on?
A. When you are drifting.
Q. When you put the brakes on don't the brakes have a tendency to stop the train?
A. Yes when you want to stop.
Q. If you take it off they won't stop it?
A. Yes.
Q. It will go better without them than it will with them?
A. It will stop slower.

Q. When he said that will do, you immediately released the brakes?

A. I put the brake on.

Q. I thought when he said that will do you released the brakes first and then put them on afterward didn't you?

A. When he hollered at me I looked at him, he said that will do, you hit somebody, and I big holed her, threw the emergency.

161 Q. When he told you that you had hit somebody then you threw the brake in the emergency?

A. Yes sir.

Q. You had already hit somebody according to his statement before he told you to throw them on?

A. Well I don't know, I didn't see him hit.

Q. According to his statement he said you had hit somebody and then you threw the brakes on?

A. Yes sir.

Q. He didn't notify you did he that there was a man coming along there who was about to get on the track did he?

A. No sir.

Q. Well now you say just about the time you got to the Oklahoma Railway track you were going about 12 miles per hour?

A. Yes sir.

Q. You were slowing down a little all the time at that time?

A. Slowing down all the time, yes sir.

Q. From the railway tracks back to Western Avenue was about three hundred feet according to the testimony, about what speed were you going back that three hundred feet, one hundred yards from the Oklahoma Railway Company tracks if you were going 12 miles an hour when you struck the Oklahoma Railway

162 track?

A. Well I held it right to ten or twelve miles an hour.

Q. But you said a moment ago in answer to Mr. Roberts you were about 12 when you was at the Oklahoma Railway track, now you had the brakes on from Western Avenue down to that place?

A. Yes sir.

Q. That's about three hundred feet or about one hundred yards, I want to know if you had the brakes on, what speed you were going when you was at Western Avenue?

A. About 12 miles an hour.

Q. You wasn't reducing it much?

A. I wasn't putting much on.

Q. How hard did you have the brakes on?

A. About six or eight pound reduction.

Q. Was that the same you had on when you left the brickyard?

A. Yes sir I can make that reduction and reduce my train right down.

Q. When you left the brickyard what did you have on it?

A. I had the standard pressure, 70 pounds and I reduced my train down to 12 miles an hour through the city limits.

Q. Well then you kept the 8 pounds on until you got to the Oklahoma Railway track did you?

163 A. Well I don't know but what I released the brakes once.
Q. You released them once?
A. Yes sir.
Q. But that is the amount of air you had on, was eight after you had got to the Oklahoma City limits?
A. Yes sir.
Q. And after you got to the street car tracks you run at 12 miles an hour all the time didn't you?
A. Yes sir.
Q. And you didn't have your engine pulling?
A. No sir.
Q. If you have the brakes on that reduces the speed all the time don't it?
A. Yes sir.
Q. So you were just about stopped when you got to Western Avenue wasn't you under those circumstances?
A. No, no.
Q. Now then do you remember what speed you were going as you crossed McKinley avenue or do you have any personal recollection of that?
A. I don't know where McKinley avenue is at.
Q. It is about two or three streets on further west, do you have any personal recollection about what speed you were going?
A. No sir.
164 Q. You don't have any personal recollection as to what speed you were going when you crossed Western?
A. No sir.
Q. You were looking out for the Frisco crossing more than anything else?
A. I was looking out over the track yes sir.
Q. You didn't notice on the left hand side, the fireman looks out on that side?
A. We both looked out, yes sir.
Q. You looked out more on the right than on the left didn't you?
A. I saw everything in plain view in front of me.
Q. Did you look just on the track or did you look on the side of the track?
A. I looked ahead of me.
Q. Did you look along the side of the track along there?
A. I just looked ahead of me on both sides of the track.
Q. Did you look on each side of the track to see what was on the track?
A. Yes sir.
Q. You saw this Oklahoma Railway car just south of your track?
A. It approached there at the same time I did.
Q. How far away from there did it stop?
A. About 15 feet I guess.
Q. About fifteen feet from the track?
165 A. Railroad track yes sir, in other words right in front of that little platform where the sign is no trespassing.

Q. You told Mr. Roberts your train was whistling at the time it crossed this Railway track at the time of the accident is that true?
A. I was whistling on it or just before I got to it.
Q. You whistled there?
A. Yes sir.
Q. Could Mr. Yates the fireman hear good?
A. He ought to have heard it, yes sir.
Q. Well did you whistle for each one of the streets as you got to them on that day?
A. Yes sir.
Q. Or just three of them?
A. I whistled for all of them from the city limits.
Q. Every one of them, you whistled as you got to it?
A. Yes sir.
Q. Do you testify from custom or from your personal recollection——

By Mr. Roberts: I want to have the witness finish his answer.
By the Court: Mr. Bell, Counsel desires to make an objection. Please stop until he makes his objection.
By Mr. Roberts: I want to object to his interrupting the witness.
By the Court: Read the question.
166 By the Reporter (reading question): Every one of them, you whistled as you got to it?
By the Court: If you have got any further answer to make to that question, go ahead.

A. No sir I haven't.

By the Court: Read the last question.

By the Reporter (reading question): Do you testify from your personal recollection?

By the Reporter: Here he was interrupted by Mr. Roberts' objection.

Q. Do you testify from custom or just your personal recollection as to whistling at each one of the crossings before you got to the Railway track?
A. Yes sir.
Q. From your custom?
A. Yes sir.
Q. You can't have a personal recollection can you Mr. Bergoyle of each whistle that you sounded on the trip from El Reno to Oklahoma City?
A. No sir I never counted the road crossings, but we have got signs up all along and rules and regulations to cover them.
Q. You have signs there?
A. Yes sir.
Q. Is there signs up telling you to sound the whistle on each one of these crossings?
167 A. Whistle board, yes sir.

Q. At each one of the streets in Oklahoma City?
A. Yes sir.
Q. There is a sign up telling you to whistle?
A. Yes sir.
Q. Where are these signs.
A. They are located alongside of the track about the middle of the block.
Q. How does it read?
A. Just a little sign up there, "W" for whistle.
Q. And you only testify from what your custom is about that?
A. Custo*n*, yes sir.
Q. And your judgment is on this occasion that your train was going about 12 miles per hour?
A. Yes sir.
Q. From your personal recollection you couldn't testify positive as to what it was could you?
A. Yes sir.
Q. You can from your personal recollection?
A. Yes sir.
Q. Can you as to your personal recollection as to what speed it was going the day before that at that place?
A. Yes sir.
Q. What speed was it going?
A. Twelve miles per hour.
168 Q. And the trip before that?
A. Twelve miles an hour.
Q. You have a personal recollection about that?
A. It might be slower and it might be I stopped up there.
Q. Do you have a personal recollection about that as to what speed you were going at each one of these times you made this trip?
A. I don't keep any report of my trips.
Q. You just testify as to what your duty is and your custom?
A. My custom, yes sir.
Q. Your duty is to go at not more than twelve miles per hour isn't it?
A. Yes sir.
Q. That's all.

Witness excused.

169 R. B. HOWARD, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. State your name?
A. R. B. Howard.
Q. You are passenger conductor working for the Receiver of the Rock Island at this time?
A. Yes, sir.

Q. And were engaged in the same kind of business on December 11, 1915?

A. Yes, sir.

Q. Do you remember of the occasion of the accident to an old gentleman in Oklahoma City on that day?

A. I remember the accident hepp-ned up here at the crossing.

Q. What were you doing just prior to the time you reached the intersection of the street railway tracks and the Rock Island tracks at that point?

A. I had gotten up and started to go to the rear end of the smoker.

Q. Where were you?

A. I was in the front end of the smoking car in the Jim Crow car.

Q. Were you in charge of the train?

170 A. Yes, sir.

Q. What was the number of the train?

A. Forty four.

Q. Due into oklahoma City at what time?

A. Due in here at that time at 8:20 I believe.

Q. Were you on time or late?

A. Late.

Q. About how much?

A. About an hour and twenty five minutes late.

Q. On what part of the train were you as you approached the street railway intersection of the tracks?

A. I was in the front end of the Jim Crow car.

Q. Did you leave the train before it stopped?

A. No, sir, I got off of the train after it stopped.

Q. Where were you just before it stopped?

A. I was at the door at the rear end of the smoker.

Q. Did you see anything of the accident?

A. I didn't.

Q. Know anything of it until the train stopped?

A. I didn't know of it until after it stopped, I got off on the south side of the track.

Q. Did you see anything on the south side of the track?

A. Nothing.

Q. Did you see anything on the north side of the track?

A. After I went over on the north side I did.

Q. Where were you as the train came into the city limits

171 of Oklahoma City at the west side of town?

A. I was in the front end of the Jim Crow car.

Q. Remain there until you left the train?

A. I was in there until we were coming into town, the brakes were set and I thought we were getting pretty close into town and I just looked out and got up to go back to open the door preparatory to letting the passengers off at the station.

Q. I can't hear you. What kind of application of the brakes do you have reference to?

A. Just the service application.

Q. Tell the jury what you mean by the service application.

16A. We have got two applications. An application, now if you

don't set the emergency application the service application is when you want to slow down or stop gradually.

Q. About how many pounds do you use for the service application?

A. Generally about 10 to 15 pounds.

Q. How many for an emergency application?

A. Emergency application gives us all.

Q. How much is that?

A. You can't get but a fifty pound brake pressure in the cylinder.

Q. Have you any reserve so you can increase that to seventy pounds?

172 A. No, you can only give it fifty pounds pressure in the cylinder.

Q. Now, you say you were in the Jim Crow car when the service application was made, and started back?

A. Yes, sir.

Q. What did you do then?

A. I walked back to the rear end of the Jim Crow car to open the door for the passengers when we got to the station and cut the crossing, you have to cut Broadway crossing.

Q. Where were you when you felt the application of the emergency brake, where was the train?

A. The emergency, I was at the door just opening the door.

Q. Where was the train when the emergency application was made to the brake?

A. Well, the train passed over the crossing while I was,—the car I was in passed over the crossing just while I was opening the door.

Q. How many cars did you have on that train that morning?

A. Had eight cars.

Q. What were they?

A. The train consisted of a combination mail and baggage car, and a straigh- baggage car, a Jim Crow car, two coaches and three sleepers.

Q. That is in addition to the engine and tender?

A. Yes, that is in addition to the engine and tender.

173 Q. Do you know the number of your engine that morning?

A. Thirteen O seven I think was the engine.

Q. When the train stopped I think you told me you got down?

A. Yes, sir.

Q. And found Mr. Roberts on the other side of the track, do you know how long the train remained there?

A. Well, we was there about ten minutes.

Q. What did it do then?

A. Well, we went down to the station, cut the crossing and unloaded the passengers.

Q. How long have you worked for the Rock Island?

A. I have been working about 37 or 8 years.

Q. What different kinds of employment have you had?

A. Well, sir, I fired an engine first, and I have braked.

Q. What do you mean by braked?

A. Been a brakeman and switchman and conductor.

Q. How long have you been a conductor?

A. I have been running a train for the C. O. & G. and Rock Island for *other* 15 years.

Q. How long have you been a passenger conductor?

A. I have been running a passenger train for about ten years.

Q. Are you familiar with the speed of trains during that period?

A. Well, I have got a tolerable fair idea.

Q. Don't you know whether you are or not, can't you say yes or no, if you are not the jury don't want to hear you?

174 A. I don't know just what you mean.

Q. I want to know Mr. Howard whether you are familiar with the speed of passenger trains as a result of your experience as a pas-enger conductor?

A. I couldn't be just exactly correct you know as to that, as to one mile or two miles of the speed of the train in an hour, but I would be approximately close to it.

Q. How long have you worked on the Rock Island and the Choctaw?

A. I have been over here five or six years I guess, the last time running passenger trains.

Q. How long on the Panhandle division?

A. About five or six years I guess.

Q. The Panhandle Division includes Oklahoma City, does it?

A. Yes, sir.

Q. In running these trains back and forth on the Panhandle division through Oklahoma City have you become acquainted with the crossings and the character of the track and the manner in which the speed is adjusted and so forth?

A. Yes, sir.

Q. I will ask you to state to the jury in your judgment about what speed train No. 44 was running that morning as you ap-

175 proached the intersection of the street railway tracks and the Rock Island tracks in Oklahoma City at the place of the accident?

A. I would judge about 12 miles an hour, may have been a mile or two faster than that and it may have been a mile or two slower. I wasn't paying any particular attention to the speed at that time.

Q. That's all.

Cross-examination.

By Mr. Bell:

Q. Mr. Howard I believe you said just as the smoking car that you were in passed the Oklahoma Railway tracks there the emergency was put on was it?

A. Well the emergency was on when I opened the door, the emergency was put on before I opened the door.

Q. Just before you opened the door?

A. Yes sir, and that was just about the time that that car was going across the crossing.

Q. Crossing of the Oklahoma Railway track?

A. Yes sir, the brake had been set and then released and then set again.

Q. It had been set and then released and then set again?

A. Yes sir.

Q. Well then when it went into emergency was just about the time your car crossed the Oklahoma Railway track?

176 A. Yes sir.

Q. Now then what is in front of the smoker, what was that day?

A. Baggage car and mail car.

Q. Baggage car and mail car and then the tender and the engine?

A. Yes sir.

Q. How long is the baggage car and the mail car?

A. The mail car is shorter than the baggage care. The mail car I would judge is about 56 feet, I never measured one, I was just judging that.

Q. How is the other car?

A. The baggage car must be about 60 feet.

Q. Who of you went out to where Mr. Roberts was?

A. I went out to him after I went through on the other side.

Q. Who else went out there?

A. The fireman went back ahead of me.

Q. Engineer go back too?

A. No.

Q. Just the fireman and you?

A. Yes sir.

Q. Where did you find him?

A. Found him lying on the north side of the track and east of the street car tracks I would judge about thirty or thirty-five feet.

Q. Did you take him up and carry him on into town?

177 A. No I never touched him.

Q. Well now you say about the time then that the emergency was put on you thought it was running about 12 miles an hour up to that time, it might have been a little more or a little less?

A. I don't think, at the time the emergency was put on he wasn't running that fast.

Q. Just before they put the emergency on about the time the engine passed the Oklahoma Railway track?

A. Probably running about twelve miles an hour.

Q. They were reducing speed all the time?

A. Yes sir.

Q. What speed do you think it was running back three hundred feet over there, say back to Western Avenue a hundred yards from there?

A. Well probably Western Avenue, they might have been running two or three miles an hour faster than that.

Q. That would be fourteen or fifteen miles?

A. Yes sir.

Q. Then back to Klein three hundred feet further what was the speed back there as far as Klein?

A. Well that probably would be a mile or two faster back there.

Q. That would be something like fifteen or sixteen miles?
A. Yes sir.
Q. Well Mr. Howard at McKinley a block of three hundred fee back, what was the speed at McKinley?
178 A. Well probably it wouldn't be running any faster bac there.
Q. About fifte or sixteen miles?
A. Probably, m.ght have been fifteen miles an hour.
Q. And you had the brakes on and had the air shut off?
A. We had the brakes set.
Q. When the brakes are set with air it constantly reduces th speed I believe. That is all.

Witness excused.

179 PATRICK QUINN, called as a witness on behalf of the defend ant, being first duly sworn, on oath testified as follows, to-wit

Direct examination.

By Mr. Roberts:

Q. State your name?
A. Patrick Quinn.
Q. You were section Repairer working for the Receiver of th Rock Island in December 1915 when the accident happened to Mr Roberts down here in Oklahoma City?
A. Yes sir.
Q. You are still working for the company?
A. Yes sir.
Q. How long did you work for the Receiver of the Rock Islan prior to last December?
A. Well I have been working for the Rock Island for the las twelve or thirteen years.
Q. Have you been stationed in Oklahoma City all that time?
A. No sir I have been all along the line.
Q. How long have you been in Oklahoma City?
A. Well I have been here I guess, I don't exactly recollect but the time that Avert got moved from Geary and took these yard I came down about two weeks afterwards about a year and a half ago or something like that.
180 Q. About a year and a half or some such matter?
A. Yes sir.
Q. What is your section Mr. Quinn, what is the section you work on?
A. I work in the yards all the time, they put me up there by that mill and told me to burn up all the paper around that mill there.
Q. What are the limits of Mr. Avert's section?
A. It is about 7 miles I think.
Q. Where does it begin and where does it end?
A. It starts on this side of the Frisco crossing down there and ends up here at the Waterworks switch.

Q. Has your work then made you familiar with the tracks from the Frisco crossing to the City limits of Oklahoma City?

A. No sir my limits is from the Frisco depot that three cornered piece down there where the cars cross, I used to only go to the inter-urban crossing but since they put this other mail on I have got to go up to the Western Avenue crossing.

Q. How long have you had that limit?

A. About a month and a half or two months.

Q. Prior to that time your western limit was the street car crossing where the accident occurred?

A. Yes sir.

Q. I will ask you to state whether or not there has been any no trespass signs on the railroad right of way near the street
181 car crossing while you have been working up and down there tracks?

A. Yes there have.

Q. Where are these signs located?

A. On both sides of the crossing.

Q. I hand you Exhibit A and ask you if the sign referred to is similar to the one shown here in white? (handing witness Exhibit A.)

A. Yes sir.

Q. Have there been more than one of these signs on the Rock Island right of way during the time you have been working there this year and a half?

A. Yes there are signs there.

Q. How many?

A. Three or four of them, I wouldn't be right sure.

Q. Are there any street car trespass signs there?

A. Yes sir.

Q. Where are they?

A. One on the north side northwest corner and one on the south side, southwest, and there is one on the southeast I think.

Q. Have these signs been such that an ordinary person could read them as they passed by?

A. Yes they are plain.

Q. Large enough letters?

A. Yes sir.

182 Q. Do you remember whether or not they have been repainted?

A. Well sir I can't say whether they have or not.

Q. Don't remember that?

A. No I don't remember it.

Q. Do you know whether or not any signs for no trespassing have been placed on the right of way since the accident to Mr. Roberts?

A. No sir I haven't noticed.

Q. Just the same signs as were there before?

A. Yes sir.

Q. Do you have anything to do with watching the painting of these signs?

A. No sir.

Q. Your work is directly connected with the track?
A. Yes sir.
Q. And road bed as you have described it?
A. Yes sir.
Q. Where were you at the time the accident to Mr. Roberts occurred?
A. I was right in front of the elevator there, I was taking a bunch of paper away from the elevator.
Q. What train was it that struck him?
A. Forty four.
Q. Was it west bound?
A. Going east.
Q. Did you hear any signals?
A. Yes sir.
183 Q. What did you hear?
A. I heard the whistle and I heard the bell ringing.
Q. Where did you hear the whistle?
A. At Western and at the Interurban crossing.
Q. Any west of Western Avenue?
A. Yes sir.
Q. When did the bell stop ringing do you know?
Q. When they stopped the train the fireman got off.

Cross-examination.

By Mr. Bell:

Q. Mr. Quinn you work along the track there, you work between where the Oklahoma railway tracks cross the Rock Island and on west for some distance?
A. No sir I wasn't working west then, I wasn't going any further than the interurban crossing.
Q. You are acquainted with the ground there where the Oklahoma Railway track crosses the Rock Island?
A. Yes sir.
Q. Is that a fair representation, that is Exhibit A is that a fair representation of the situation there and of the things as they appeared at the time Mr. Roberts was hurt, except this box car here (exhibiting Exhibit A to witness)?
A. Well it looks a little that way.
Q. There is a path there leading in a northwesterly direction across from the intersection here out through this alfalfa patch?
184 A. Yes sir.
Q. That has been there some time hasn't it?
A. Yes sir.
Q. That was used by the people a good deal wasn't it in crossing and coming into Oklahoma City?
A. Yes they have been crossing there ever since I have been there.
Q. And you kind of look for it here up to this place?
A. Up to this crossing.

Q. You have stopped nobody and told them to go back on that crossing there?

By Mr. Roberts. Objected to as incompetent, irrelevant and immaterial.

By the Court: Sustained, immaterial.

By Mr. Bell: May it please the Court, the question comes up as to whether this was used with the knowledge and acquiescence of the Railroad Company and a man that had charge of the track, I think if he didn't object to people crossing I think would show something in the way of acquiescence.

By the Court: It is immaterial whether they acquiesced in it or not. It might possibly be if they permitted it to be done and the employees had knowledge of it. As to whether this trackman knew of it or not is immaterial, the objection is sustained.

By Mr. Bell: Exception.

185 By Mr. Bell: I would like to get into the record what his testimony would be with reference to that. In answer to the question the witness answered that he didn't object and hadn't objected to anyone using the path.

By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, there being no proof of authority of this witness——

By the Court: The objection is sustained, immaterial.

By Mr. Bell: Exception.

Q. Mr. Quinn that sign that is there now, this picture was taken just a few weeks ago, was that sign there like it is now at the time Mr. Roberts was hurt?

A. There was some sign there, I don't know whether it was just like that or not.

Q. There were some signs there?

A. Yes sir.

Q. Isn't it a fact that the sign that was there was indistinct and that this was painted up?

A. Not to my recollection.

Q. Would you say that it has not been done Mr. Quinn?

A. I think it is the same sign that was there only I never noticed whether they were painted or not and I was up and down there all the time too.

186 Q. I believe you said you didn't have anything to do with the painting of them?

A. No sir.

Q. Mr. Quinn what was the first thing that called your attention to this accident?

A. When I heard them putting on the air.

Q. Where were they when they began to put on the air?

A. They were right at the crossing.

Q. What crossing?

A. Interurban crossing.

Q. Was the engine at the crossing, or the smoker?

A. Yes sir the engine.

Q. Was it on the crossing or had it reached it?

A. It was on this side of it maybe about 10 feet, something like that, I couldn't exactly tell but just on this side of the interurban crossing.

Q. Did they put on the emergency there?

A. Yes sir.

Q. You can tell when they do that can you?

A. Yes I can tell.

Q. Were they slowing down any up to that time?

A. Yes sir they were slowing down they were slowing down above the Western Avenue crossing all the time slowing down to go through the yards.

Q. What speed were they going as they came to the interurban crossing?

187 By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, the witness not qualified, and not proper cross examination.

By the Court: Overruled.

By Mr. Roberts: Exception.

Q. Did he ask you about the speed on direct examination?

A. No sir.

Q. Now then Mr. Quinn when did you first notice the train?

A. I notice all them passenger trains every morning.

Q. Where did you first notice this one?

A. I noticed them above Western crossing when they were whistling in for that crossing.

Q. You were over there about that crossing?

A. No sir I was way down here by the elevator?

Q. Where is it?

A. Down east of the interurban crossing.

Q. Which side of the railroad tracks is it?

A. On the south side.

Q. How far is that east of the interurban crossing?

A. It must be about five hundred feet or six hundred feet, somewheres along there.

Q. About two hundred yards down there is it. And what were you doing at the time you first observed the train coming down by Western Avenue?

A. I was carrying paper across the track and burning it up.

Q. How many times did you hear that train whistle before
188 it got to you?

A. Heard it whistle for the Western Avenue and for the interurban crossing.

Q. That is the only places it whistled?

A. It whistled way outside of the city limits.

Q. Didn't it whistle at Klein or McKinley?

A. I don't know whether it did or not.

Q. You heard it didn't you?

A. I heard it at them crossings.

Q. Did you hear it at Klein and McKinley and at these other crossings?

A. I heard it pretty near every time.
Q. I am not asking you about that, you said you heard it at Western Avenue and also at the interurban crossing.
A. Yes sir.
Q. Then you heard it outside of the city limits, do you have any personal recollection of hearing it anywhere else?
A. No sir.
Q. Did it whistle anywhere else after it approached the city?
A. No sir, I,—Of course it might have whistled but I wasn't paying any attention to it.
Q. You didn't give any statement about this case right after it occurred did you?

By Mr. Roberts: Objected to as immaterial.
189 By the Court: Overruled.
By Mr. Roberts: Exception.

A. How is that?
Q. Did you make any statement with reference to this matter soon after it occurred?
A. Yes sir.
Q. Who to?
A. I can't think of his name.
Q. That will be all right, you did give a statement. Now you were carrying paper across the track to burn it up were you?
A. Yes sir.
Q. From the south side to the north side of the track?
A. Yes sir.
Q. And you stopped on the track when you heard the whistle blow didn't you, the first one, the one that was outside of town?
A. No sir I didn't stop on the track, I had an arm full of paper and was carrying it across there and putting it in this place where I burn it.
Q. Was the train behind time that morning?
A. I don't think it was, now I won't be sure.
Q. Did you notice anything unusual about its speed or anything of that kind that morning?
A. Going about the same speed as they always do.
Q. I believe you said, did the speed increase or decrease as it came into town?
190 A. Always decreases before it struck Western Avenue.
Q. Then decreased from there on in didn't it?
A. Yes sir.
Q. That's all.

Witness excused.

By the Court: Gentlemen, it is now six o'clock. The court will take a recess until tomorrow morning at nine o'clock. You gentlemen will be excused until that time. Bear in mind the admonitions of the court while you are absent. Be back promptly.

Thereupon: Court is adjourned until Thursday Morning, May 18, 1916, at 9:00 A. M.

Thereafter: On to-wit, Thursday morning, May 18, 1916, at 9:00 A. M., court met pursuant to adjournment; all officers being present.

By the Court: The jury are all present, proceed with the case gentlemen.

By Mr. Bell: Plaintiff offers in evidence Exhibit "C."

There being no objection made, Exhibit "C" is exhibited to the jury, and a copy thereof is hereto attached and made a part hereof, as follows:

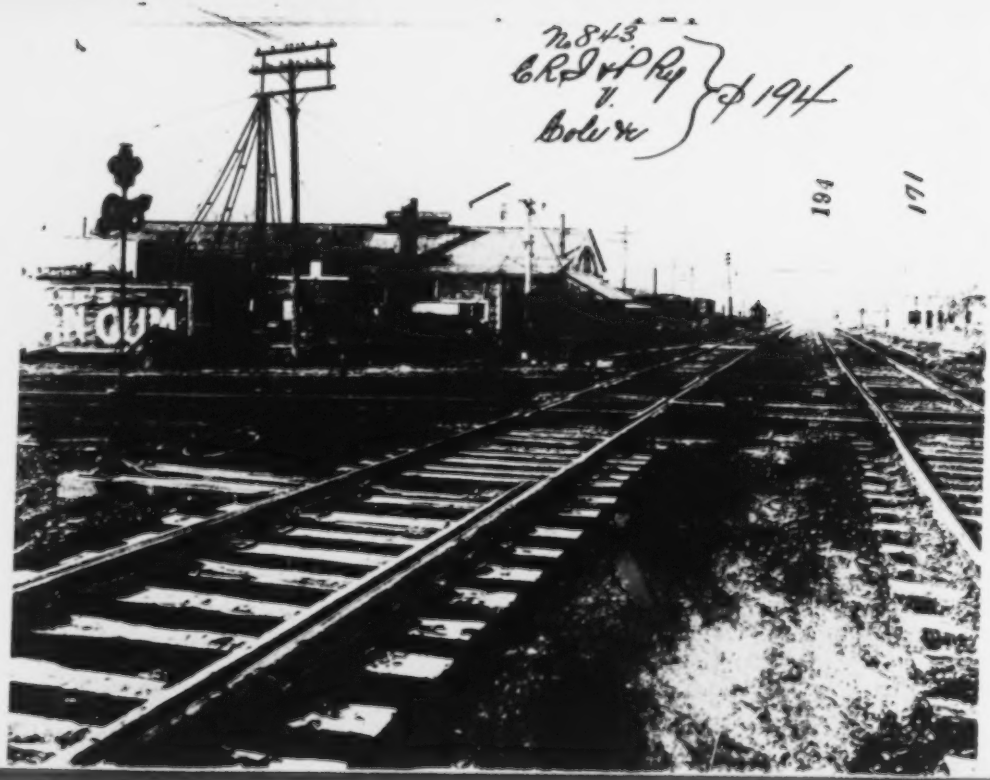
(Here follows picture marked p. 191.)

Plaintiff's Exhibit "C"

mo 8:43
6-8-8 JFM
Date

no 843
C.R.I. & P. Ry
Colo. Vol.
p. 193





No 843.
C R I & P Ry
v.
Bolin
194

194 171


No 843
C.R.I. & P. Ry
v.
Colwell
No 195
195
172


No 843
C R I & P Ry
v.
Cole et
P 196
196
172


No 843.
C.R.D. & P. Ry
Cole
197
174

By Mr. Roberts: Defendant offers in evidence Exhibits 2, 3, 4, 5, and 6.

By Mr. Bell: Let me see them?

(Exhibits 2, 3, 4, 5, and 6 handed to counsel.)

By Mr. Bell: No objection.

By the Court: Let them be admitted.

Thereupon: Defendant's Exhibits 2, 3, 4, 5, and 6 are admitted in evidence and exhibited to the jury, and copies thereof are made a part hereof, and are in words and figures as follows, to-wit:

(Here follow pictures marked pp. 193 to 197.)

198 HAROLD COCHRAN, called as a witness on behalf of defendant, being first duly sworn on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. State your name.
A. Harold Cochran.
Q. Where were you living December 11, 1915?
A. 1808 Linwood.
Q. Were you working at that time?
A. No sir.
Q. Do you remember the occasion of the accident to an old gentleman by the name of Roberts at the intersection of the Street Railway tracks and the Rock Island tracks?
A. Yes sir.
Q. Where were you just prior to that accident?
A. I was just at Western Avenue, stepped off of Western Avenue when the train struck him.
Q. Did you hear the train prior to that time?
A. Heard it come into town.
Q. Did you hear it give any signals?
A. Whistled for station.
Q. How far West of you?
A. Just a little ways, the whistle post for station is between Klein and Western.

199 Q. Did you hear any whistle besides that?
A. It whistled just as it crossed Western.
Q. Do you know whether or not there was any bell ringing?
A. Yes sir the bell was ringing all the time.
Q. Where did you see Mr. Roberts before the accident?
A. He was going across the alfalfa patch northwest from the tracks there.
Q. Could you see him?
A. The first time I ever saw him he was clear up on to the tracks.
Q. How far from the track on which the train was running?
A. He was just a little ways when I first looked up the track, it was pretty cold and I had my head down.
Q. How many feet, or what distance?
A. He was just a couple of tracks away, about a hundred feet I guess.
Q. North?
A. Yes sir.
Q. Walking?
A. Walking southeast.
Q. Are you familiar with the crossing there, the intersection of the Street Railway tracks and the Rock Island?
A. Yes sir.
Q. Do you know whether or not there are any signs there?
A. Yes sir there is signs there.
Q. Do you know how many?

200 A. It says on the signs, private property, no trespassing. There is one on the street railway line and there is one on the Rock Island line, there is one on each side of the crossing.

Q. Do you have occasion to use that crossing?

A. No sir.

Q. Can you tell us whether or not Western Avenue has cement sidewalks?

A. Yes sir.

Q. North from Main street?

A. There is a sidewalk on the east side of the street on the west there isn't any. I mean on the west side there is one and on the east side there is not any from 4th street down.

Q. Down how far?

A. Well the sidewalk is at Second Street again, from Fourth to Second there isn't any sidewalk on the east side of Western Avenue.

Q. Well from Second Street on south there is sidewalks on both sides?

A. I don't know how far it runs down.

Q. To Main?

A. It runs on past Main.

Q. Persons who take this diagonal pathway across the alfalfa and cross the street railway and Rock Island tracks could go by these sidewalks on Western Avenue and Main couldn't they?

201 A. Yes sir they use that for a short cut.

Q. How long have you lived here Harold?

A. About seven years.

Q. Do you know whether or not the Rock Island or the Street railway company was first at that intersection point?

A. No I don't.

Q. That's all.

Cross-examination.

By Mr. Bell:

Q. Your name is Robert Cochran?

A. Harold Cochran.

Q. Harold you testified before the inquest proceedings didn't you here at the court house when Judge Hooker was making the examination?

A. No sir it was Judge Hawkins on First Street in the two hundred block on First Street.

Q. You testified right after Mr. Roberts was killed?

A. The Monday afterward, yes sir.

Q. Didn't you state at that time Robert, didn't you state at that time, Harold, that it was right on the street car crossing when it whistled, that was the only time I ever heard it whistle but the bell was ringing?

202 A. It was right in between streets there right at the crossing.

Q. Didn't you state at that time that was the only time you heard the train whistle?

A. It was whistling right——

Q. Just answer my question, didn't you state at that time that was the only time you heard the train whistle?

A. I don't know whether I did or not.

Q. Just say whether you answered this way: Well it was right on the street car crossing when it whistled, that was the only time I ever heard it whistle but the bell was ringing. Wasn't that your testimony before?

A. I guess it was.

Q. Robert you have talked to the claim agent of the Rock Island about this since that time?

A. Yes sir.

Q. Now then Harold you say when you first saw Mr. Roberts he was something like 100 feet from where he got struck?

A. Yes sir.

Q. He was going down that little path?

A. Southeast.

Q. Down that little pathway there wasn't it?

A. Yes sir.

Q. And you saw him going right along until he was struck?

A. Yes sir.

Q. He didn't stop any did he, just went right on?

203 A. Yes sir.

Q. How fast was he going Harold?

A. He was just walking slowly.

Q. He was facing southeast you say.

A. Yes sir.

Q. Well Harold where was the train when you first saw Mr. Roberts there going toward the track?

A. It was just crossing Western Avenue, the train was just crossing Western Avenue.

Q. The engine was?

A. Yes sir.

Q. Now let's see if I understand that. At the time you saw the old gentleman about a hundred feet from the track going southeast toward the track the engine was just about crossing Western Avenue?

A. Yes sir.

Q. And you were there pretty close to Western yourself?

A. Yes sir.

Q. And then Mr. Roberts walked right on in a southeast direction?

A. Yes sir.

Q. He didn't turn around and look up towards the track at all?

A. No sir.

Q. Did he have a stick in his hand?

A. I never noticed whether he had a stick in his hand or not.

Q. He had his hand up to his face didn't he?

204 A. I never noticed that.

Q. The wind was blowing?

A. The wind was blowing and it was pretty cold at that time, he had his head wrapped up.

Q. He had his head wrapped up?

A. At least I think he did, I am not sure.

Q. There wasn't anything to prevent you from seeing him there at that time?

A. No sir.

Q. Was there anything to prevent the fireman who was on the train from seeing him there?

A. Not as I know of.

By Mr. Roberts: Objected to as calling for a conclusion of the witness.

Q. Was there anything in the way of the fireman and the old man?

A. No sir, open track.

Q. Now Robert, now then I believe you said he didn't turn around at all to look toward you or toward the train?

A. No sir.

Q. Harold, I don't know whether I called you Robert or Harold, you called the attention of the other boy and said that old man is going to get run over didn't you?

A. Yes sir.

205 Q. When you saw him walking that way?

A. Yes sir.

Q. What did you do when you called the attention of the boy, did you holler or do anything?

A. I hollered at him, and then I says look the old man is going to get run over and we run down there and then it hit him.

Q. At the time you saw him a hundred feet from there going along in that south east direction you saw he was liable to get run over?

A. Yes sir.

Q. How was it he didn't see the train?

A. He wasn't looking that way.

Q. When he was struck the train shut him out from your view didn't it, just at the time he was struck?

A. Just at the time he was struck and then he was knocked out to the side.

Q. You saw him step on to the track?

A. Yes sir.

Q. Do you know how many steps he took onto the track?

A. No sir.

Q. He stepped on and got out of your view?

A. Right in the middle of the track the train shut us off from seeing him.

Q. Harold how far was he knocked?

A. About 25 or 30 feet.

Q. Was he thrown up in the air any or not?

206 A. Just thrown out to the side of the engine.

Q. When you got down there he was dead was he?

A. Yes sir.
Q. Was he drug up the track any?
A. No sir I don't think he was, at least I didn't see him drug any, just threw out.
Q. Didn't you state in that examination at the inquest Harold in answer to the question how far did the train knock him, well about thirty feet I guess it just drug him up the track ahead of it and threw him out to the side?

By Mr. Roberts: Objected to as trying to impeach on his own cross examination and not brought out on direct examination.

By the Court: Overruled.
By Mr. Roberts: Exception.

Q. What is your answer to that?
A. Read it again.
Q. I am just asking this, didn't you at that inquest proceeding, in answer to the following question, how far did the train knock him, answer, as follows, well about thirty feet I guess, it just drug him up the track ahead of it and threw him out to the side?

By Mr. Roberts: Same objection.
By the Court: Overruled.
By Mr. Roberts: Exception.

207 Q. Did you answer that way?
A. It threw him out to the side.
Q. Did you answer that it drug him up the track ahead of it?
A. I am not sure whether it drug him or not. I wouldn't say. I am not sure.
Q. You do state it knocked him about thirty feet though do you?
A. Yes sir.
Q. Now then didn't you state at that time you didn't know whether the train whistled for Western Avenue West of Western Avenue or not, Harold?
A. All I know it was whistling when it was coming down the track.
Q. In answer to Judge Hooker's question, as follows: You never heard the train whistle when it was west of Western Avenue did you, your answer was as follows, well I am not sure whether it whistled I wouldn't say because I am not sure, was that your testimony?
A. Yes sir.
Q. Your mind was fresher at that time wasn't it?
A. Yes sir.
Q. You talked to the claim agent after that time?
A. Yes sir.
Q. Harold did you observe how fast the train was going as it came into Western Avenue?

208 By Mr. Roberts: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

By Mr. Bell: I will withdraw the question as not proper cross examination.

Q. That's all.

Redirect examination.

By Mr. Roberts:

Q. What is the fact now Harold about the whistling, just tell us what the truth is about the whistling?
A. Well the train was coming along here, it was near us, it was whistling up the track, when it got right close to us it started whistling and whistled until it crossed the crossing, Western Avenue crossing, and the bell was ringing all the time.
Q. That's all.

Recross-examination.

By Mr. Bell:

Q. But then Harold you did tell at the other time at the examination, the inquest, that the whistle that you heard that they made at the intersection of the Oklahoma Railway track with the Rock Island track was the only whistle you heard?
A. Yes sir, whistled all the time.
Q. How is that?
A. Whistled all the time, just one whistle, but it was
209 clear across the crossing.
Q. Didn't you state you were not sure whether it was whistling, I wouldn't say because I am not sure didn't you state that at the inquest?
A. I don't know whether I did or not.
Q. That's all.

Witness Excused.

210 A. SPARK, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. State your name?
A. A. Sparks.
Q. Where do you live Mr. Sparks?
A. 420 North Ollie.
Q. What were you doing December 11, 1915?
A. I was working on the Belle Isle street car.
Q. You still have the same position?
A. No sir, only on the 4th street.
Q. You are working for the Street Railway Company?
A. Yes sir.
Q. As conductor?

A. Yes sir.

Q. Do you remember the occasion of an old gentleman by the name of Roberts being killed at the intersection of the Street Railway Tracks and the Rock Island tracks at Oklahoma City?

A. Yes sir.

Q. Where were you just prior to the accident?

A. We had run our car up to the Rock Island crossing and stopped and I was about half way between the vestibule and the front end of the car.

211 Q. What kind of car was that?

A. One of these Belle Isle steel cars, side entrance.

Q. Entrance on both sides?

A. Yes, sir.

Q. In what direction was your car running as you approached the intersection of the Rock Island and the Street Railway tracks?

A. North.

Q. Where did it stop?

A. About thirty feet of the Rock Island track.

Q. On which side?

A. South side.

Q. Did you see the Rock Island train approaching?

A. No, sir.

Q. Did you hear it?

A. Yes, sir.

Q. What did you hear?

A. I heard a signal, but as to what the signals were I can't just remember, but I knew there was a Rock Island passenger coming.

Q. Where did you first see Mr. Roberts?

A. Just as he stepped on the Rock Island track.

Q. About where was that?

A. It was where our tracks and the Rock Island cross. He was just east of the east rail of our track.

Q. How many street railway tracks are there at that intersection?

212 A. Two.

Q. And you say this was at which one?

A. On the east track, on the east rail.

Q. How many Rock Island tracks are there *there*?

A. Three.

Q. Which one of the Rock Island tracks?

A. On the south one.

Q. It was on the extreme south Rock Island track and the east Street Railway Company track?

A. Yes, sir.

Q. Was that intersection that you saw him when he was struck?

A. Yes, sir.

Q. Did you know him?

A. Yes, sir.

Q. How did you come to know who he was?

A. By his frequently riding with me.

Q. How long a time had he been riding on the route you had been running on?
A. Something like three years.
Q. Tell the jury in what position he was or what you saw about him as you saw him there just before he was struck?
A. Just as Mr. Roberts stepped on the tracks the engine struck him, I seen both at the same instant, that is all I can tell you.
Q. You didn't see him prior to that time?
213 A. No, sir.
Q. Why didn't you see him?
A. Because my car was in my sight, I couldn't see him.
Q. What were you doing Mr. Sparks?
A. I was getting ready to flag the crossing.
Q. Explain to the jury what you mean by that, please.
A. Whenever we approach a railroad crossing we have to go and flag our car across any railroad crossing.
Q. What had you done to carry out that purpose?
A. I had got off of the car and started to the front for that purpose.
Q. On which side of the car?
A. On the right hand side.
Q. What direction?
A. On the east side of the car.
Q. You had gotten off from the middle entrance of this car on the east side and walked northward along the east side of it when he came into your view just prior to the accident?
A. Yes, sir.
Q. That's all.

214 Cross-examination.

By Mr. Bell:

Q. How far was he thrown, or knocked Mr. Sparks?
A. As well as I remember now I think I stepped it, it was 15 steps, I aimed to step three feet at the time but whether I did or not I don't know.
Q. Three feet at a time?
A. Thirty nine feet, something like thirty nine or forty feet.

Redirect examination.

By Mr. Roberts:

Q. There is one question I meant to ask you but forgot, could you ascertain the speed of the train from where you were or from what you know of its coming?
A. No, sir.
Q. From the signals given and from the sounds made and from the other circumstances there, was the speed in your judgment unusual to what the trains ordinarily run coming along there?

By Mr. Bell: Objected to as leading and suggestive and calling for a conclusion.

By the Court: Sustained.

Q. What was the character of the speed of this train on this morning, compared with the usual speed of Rock Island trains at that place under the circumstances?

215 By Mr. Bell: That is objected to. He says he didn't notice the speed, incompetent, irrelevant and immaterial.

By the Court: Who introduced the evidence, what witness said it was going at an unusual speed?

By Mr. Roberts: Mr. Malone testified to that in answer to the question.

By the Court: What witness was that?

By Mr. Roberts: Our witness.

By Mr. Bell: The objection is withdrawn.

By Mr. Roberts: Please read the question.

By the Reporter (reading): What was the character of the speed of this train on this morning, compared with the usual speed of Rock Island trains at that place under the circumstances?

A. Well, I can't say I formed an idea that the train was running the same as most trains that come into Oklahoma City at that point, that's all I can say in regard to the speed.

Q. That's all.

Recross-examination.

By Mr. Bell:

Q. You just formed an idea, you didn't notice it until it struck him?

A. I didn't see it until it struck him.

216 Q. You did see it knock him about thirty nine or forty feet?

A. Yes, sir.

Q. That's all.

Witness excused.

217 A. T. STROUD, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. State your name.

A. A. T. Stroud.

Q. What were you doing on December 11, 1915?

A. I was working for the street car company.

Q. Oklahoma City?

A. Yes sir.

Q. You still have that position with them?

A. Yes sir.

Q. Do you remember the occasion of an accident to Mr. Roberts at the intersection of the street car tracks and the Rock Island tracks in Oklahoma City on that day?

A. Yes sir.

Q. Where were you at the time of the accident?

A. I was on a car that stopped at the railroad crossing just almost an instant before the accident happened.

Q. Do you remember what time it was that you came to a stop with that car?

A. Yes sir it was about 9:41 A. M.

Q. Where had your car been running, in what direction
218 just prior to this stop?

A. We were going north on Ollie Street.

Q. Is that street open to the public?

A. No sir I think not for vehicles.

Q. How far from the south track of the Rock Island tracks did your car come to a stop?

A. Well I would judge from thirty five to forty feet something like that.

Q. What kind of a car was it, a front entrance or side entrance car?

A. Center entrance.

Q. The usual Belle Isle car?

A. Yes sir.

Q. Known to Oklahoma City people?

A. Yes sir.

Q. What was your position in that car?

A. Right in the front end.

Q. Were your windows up or down?

A. Up.

Q. What was the character of the day?

A. Well it was kind of a stormy day, it wasn't exactly stormy, it was cold and disagre-able, and some wind blowing.

Q. Oklahoma December day?

A. Something like that, yes sir.

Q. When did you first see Mr. Roberts before the accident?
219 A. Well I saw him, well it wasn't but a very few seconds before the accident when I first saw him.

Q. What direction was he coming?

A. When I first saw him he seemed to be standing still.

Q. For any length of time or just momentarily?

A. When I first noticed him he seemed to be standing still, I don't know whether he had been there long or not. I didn't know he was there until I stopped and looked up and seen him standing there.

Q. Did he then move?

A. Yes sir.

Q. In what direction?

A. South, I don't know whether he was going directly south or not.

Q. In the direction in which you were, or opposite?

A. Yes sir towards where I was.

Q. Just tell the jury what you did in connection with the movements there and what you saw further than what you have told, Mr. Stroud.

A. It all happened so quick I didn't have time to do very much or see very much. He started, he seemed like he was standing on the—There is three tracks on the Rock Island, and two tracks of ours,—it seemed like he was standing on the center track of the Rock Island when I first noticed him and then took a couple of steps forward and just paused a moment and then he just kind of
220 rested his foot a little, I don't know but what he took another step onto the main line track, and about that time the train hit him and I saw the train hit him and saw him go up on the front end of the engine.

Q. Did anybody make any effort to warn him?

A. I tried to holler at him, tried twice, but I had such an awful bad cold that I couldn't holler loud enough for him to hear me.

Q. You don't know whether he heard you or not?

A. No but I rather think he didn't because I couldn't holler very loud.

Q. Did he give any evidence of knowing of the approach of the Rock Island train?

A. No sir I don't think he did.

Q. From the direction in which he was looking, an east south direction, do you know whether he saw the street car on which you were?

A. I don't know, he may have saw it but I wouldn't say that he did.

Q. What direction was he looking?

A. He was looking down towards the ground most of the time. It seemed to me he raised his head a little bit, but I don't know whether he raised it enough to see the car or not. That was when I tried to holler at him.

221 Q. Did you hear any signals of the Rock Island train?

A. I did just before I came to a stop a little ways——

Q. When?

A. About the time I crossed the second street crossing I heard the train coming and therefore I didn't make any effort to get there any quicker, I just kind of let the car coast up to the track. I knew the train was coming anyway.

Q. Do you know what signals they were that you heard?

A. It was a whistle I heard.

Q. Did you form any idea of the speed of the train?

A. Well not nothing more than you can always tell from the sound that way whether a train is coming—well I don't know, it just seems natural you can tell a through train or a passenger train coming from the sound or the whistle.

Q. What notion did you get of the speed of the train compared with the usual speed of the trains at that point?

By Mr. Bell: Objected to as calling for a conclusion of the witness.

By the Court: Sustained.

Q. Did you from the observation you made there and the facts you have testified to Mr. Stroud form any idea with reference to the speed of this train being usual or unusual compared with the Rock Island trains at that point under the same circumstances?

222 A. No sir I don't think so.

Q. I don't understand the answer.

A. I don't understand the question exactly.

By the Court: Read the question.

By the Reporter (reading question): Did you from the observation you made there and the facts you have testified to Mr. Stroud form any idea with reference to the speed of this train being usual or unusual compared with the Rock Island trains at that point under the same circumstances.

A. Nothing more than it was about the same as usual.

Q. How long have you been running on that line Mr. Stroud?

A. Something like three months at this particular time.

Q. Do you know anything about any warnings or trespass signs at the intersection of the two railroads there?

A. Yes sir.

Q. State to the jury what you know about it?

A. Well there is a large safety first no trespassing sign on the Oklahoma Railway lines on the north side of the Rock Island and the west side of the street railway, tracks, and then there is a smaller one between the street car tracks on the south side of the Rock Island and there is a Rock Island sign between the second and third track from the south of the Rock Island, that is the Rock Island sign, and I won't be sure but I think there is another one on the east

223 side of the street car tracks on the Rock Island, I won't be sure about that.

Q. Do you remember anything about these trespass signs at the time of the accident?

A. Well it seems to me like the Rock Island sign was painted along about that time, I don't remember whether it was just that time or not.

Q. What had been the condition with reference to being plain, legible readable signs prior to this time?

A. The street car company signs were all plain enough but the Rock Island sign was getting pretty well worn, I don't know, I guess a person could read it easily enough if they wasn't too far away.

Q. Do you know how long the Rock Island signs had been there?

A. No I don't, they had been there ever since I remember seeing them a long time anyway.

Q. How long do you mean by a long time, can't you give us an idea of the months or years?

A. No I can't tell you anything about how long they have been there, but I have been seeing them there for a year or two I guess maybe anyway.

Q. Same trespass signs have been there during that period?
A. Yes sir.

224 Cross-examination.

By Mr. Bell:

Q. Mr. Stroud how far did you say Mr. Roberts was from the Rock Island track the main track when you first saw him?
A. When I first saw him he was standing seemed to have one foot on the south rail of the second track.
Q. One foot on the south rail of the second track?
A. Yes sir.
Q. That was when you first saw him?
A. Yes sir.
Q. Then you saw him proceed on towards the main track?
A. Yes sir.
Q. Is that the first track north of the main track?
A. Yes sir.
Q. He seemed to have been on a straddle of the south rail of that or north rail, which one was it?
A. It seemed to me like he had one foot resting on the top of the south rail of the middle track.
Q. And it was just an instant then until he came right on.
A. Yes sir.
Q. How fast was he going?
A. Well I can't say, he was just walking, probably like any old man would walk.
Q. Walking slowly?
225 A. He was going tolerable slow, still he was going as fast as probably any old gentleman would walk.
Q. And his face was turned in a southeast direction?
A. Almost south or maybe a little southeast.
Q. You didn't see him look back towards the Rock Island train approaching at all did you?
A. No sir.
Q. At that time?
A. No sir.
Q. Now the only whistle that you heard you say you heard a whistle before you got up there that indicated that the train was coming?
A. Yes sir.
Q. Where was your car at that time when you heard a whistle?
A. Just about to second street, just starting across or crossing second street.
Q. Do you know where the Rock Island train was at that time?
A. No sir I don't, but I would judge it to have been a couple or three blocks west of there.
Q. And that is the only whistle you heard?
A. Yes sir.
Q. Western Avenue is the first block, and the next one Klein and the next one McKinley?

A. I don't know.
226 Q. Well you were on Ollie Street, going up Ollie street?
A. Yes sir.
Q. Ollie street runs north and south?
A. Yes sir.
Q. Now how far was the old gentleman thrown Mr. Stroud?
A. I didn't measure it or anything like that, but I would judge thirty five or forty feet, something like that.
Q. Was he thrown up in the air any?
A. When the engine hit him of course the pilot threw him up against the boiler, I seen that part of it, but after that after he got up to the boiler head I didn't see him any more, he got out of my sight then.
Q. Where was the train when you first noticed it slowing up any?
A. Well I will tell you, I was watching the old man and it seemed like it all came to me right in an instant just what was going to happen and I tried to holler at him and I never looked up to the passenger train until almost the instant it hit him.
Q. And it had slowed up some then hadn't it?
A. I can't say.
Q. That was the first view you had of the passenger train?
A. Yes sir.
227 Q. And your judgment is at that time it was going, at the time it hit him, it was going about the usual speed?
A. Something near that.
Q. You don't know what speed it was going up at Western avenue before it got there and before it started to slowing up do you?
A. No sir.
Q. Now Mr. Stroud you say they painted the signs there on the Rock Island track along about or just after that time didn't they?
A. It was somewhere near that time, I don't remember just exactly when it was.
Q. Well it was after it wasn't it?
A. I can't say because I was sick the next day and I didn't go back to work for several days.
Q. You don't remember seeing them paint any before this accident?
A. I didn't see them paint any at all.
Q. You don't remember seeing the signs newly painted before the accident?
A. No sir.
Q. You never discovered that until after the accident?
A. No sir.
Q. There is a pathway leading up in a northwesterly direction from that crossing through the alfalfa patch there?
228 A. Yes sir.
Q. Been there a long time hasen't it?
A. Some time yes sir.
Q. People cross that don't they, going to town?
A. Yes sir.

Q. You look out for them on that account don't you?
A. Sure, I look out——.

By Mr. Roberts: Objected to not proper cross-examination.
By the Court: Sustained.
By Mr. Bell: I will withdraw the question, That's all.

Witness excused.

229 ALICE M. REED, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. What is you name?
A. Alice M. Reed.
Q. Do you live in Oklahoma City?
A. Yes sir.
Q. Do you remember the accident to an old gentleman by the name of Roberts at the intersection of the Rock Island and the street railway tracks near Ollie Street in Oklahoma City?
A. Yes sir.
Q. Where were you at the time of the accident?
A. I was in the Fortieth street car.
Q. Where was the car?
A. It was stopped at the crossing at the tracks.
Q. On which side of the intersection?
A. It was on the south side going north.
Q. What was your position in that car?
A. I was sitting about the third seat from the front and I was on the east side of the car as we were going north.
Q. When did you first see Mr. Roberts?
A. Well he had stopped and I was looking out the front
230 and could see him going across the tracks.
Q. What general direction was he going?
A. As I was sitting on this side of the car (indicating) I could see him in a slanting direction going in between the two car lines, that is the railroad, not the Rock Island tracks but the street car tracks.
Q. How many street car tracks along there?
A. There is two, I could see two, and he was coming comparitively crossing between them.
Q. In what direction?
A. Toward our car.
Q. Just tell the jury what you saw of Mr. Roberts' movements from the time you first saw him coming between the street car tracks in a southerly direction until the accident?
A. It was one of the coldest mornings we had had during that winter. The 11th day of December, it was very cold, and he was walking with his head down and had a cap pulled down over his head and was walking very tottering and slow, and it seemed like

the wind was blowing him and he was tottering one side or the other and walking on those cinders made it very difficult for him to walk I suppose. It looked like that to me, and his head was wrapped up, the cap pulled down until he couldn't hardly see, and he was walking with his head bowed down.

231 Q. Do you know whether he had anything in his hands?
A. No I didn't notice that.
Q. He came on in the same general direction?
A. Yes sir just kept coming towards the car.
Q. About what was his position when the accident occurred?
A. Well now in my position I couldn't see the Rock Island tracks there where I sat, it overlooks the Rock Island tracks, they run along this way (indicating) and I couldn't see them at all. In fact I was thinking nothing of the Rock Island tracks.
Q. Do you know where the conductor of the street car was?
A. No I don't.
Q. Did you see the motorman?
A. Yes sir I was right by the motorman, almost, really right up at the front, right by the motorman.
Q. Did you see any efforts made with reference to Mr. Roberts prior to the accident, with reference to his safety or warnings or anything of that kind?
A. The motorman was hollering as hard as he could for him to look out.
Q. Did you see Mr. Roberts struck by the train?
A. No sir.
Q. What was the last you saw of him before the accident.
232 A. Well he was coming across and getting nearer the car all the time and the motorman hollering look out, look out, as hard as he could holler five or six times, and I was thinking it was in fun, he was just telling him to look out because he was stopped until I seen he was in earnest, and just at that time The Rock Island engine was coming and I looked at that and I saw no more of the old gentleman until after he was killed.
Q. That's all.

Cross-examination.

By Mr. Bell:

Q. How far was he knocked Mrs. Reed?
A. Well I can't hardly tell, but I could see him it seemed probably about the length of this house, across from where I wa son the car until after he was killed.
Q. Mrs. Reed how long did you see him until after he was hit, before he was struck?
A. Well it must have been two or three minutes I should judge.
Q. He was just gradually coming along?
A. Just gradually coming along between the two tracks.
Q. And had his head wrapped up?
A. Yes sir.
Q. And his cap turned down over his eyes?

233 A. Yes sir.

Q. And was going in a southeasterly direction?

A. Yes sir.

Q. You didn't see him turn to look back towards the Rock Island train at all?

A. No sir He didn't notice that at all, he seemed to be looking down most of the time, his head was down and he was walking slowly, I didn't see him when he was struck.

Q. When he was struck and killed?

A. No sir.

Q. The wind was blowing wasn't it?

A. Yes sir blowing pretty strong.

Q. And it was pretty *d*old?

A. Yes sir very cold.

Q. Wind from the north and you then turned and saw the Rock Island train coming?

A. I didn't turn because it was right out this way (Indicating) and just then the engine dashed by.

Q. Going pretty fast wasn't it?

A. Of course I couldn't tell you how fast it was running. I just noticed it. It made quite a noise going by.

Q. That is the first you noticed of it?

A. Yes sir.

Q. You never heard the whistle or anything else?

234 A. No sir because I wasn't paying any attention.

Q. You never heard the bell ringing or whistle blowing?

A. The bell was ringing as it went by.

Q. You were about how many feet from the railroad track to where you were sitting?

A. I couldn't hardly estimate it in feet. The motorman would know about how close he stopped to the track, it was pretty close to the track, but I couldn't say.

Q. That's all.

Witness excused.

235 CORA AVERTT, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. State your name?

A. Cora Avert.

Q. You are the wife of the Rock Island section foreman of Oklahoma City?

A. Yes sir.

Q. Where were you living Mrs. Avert on December 11, 1915?

A. At the section house.

Q. How far is the section house from the intersection of the Rock Island and the street railway tracks?

A. I don't know just how far it is, it isn't very far.
Q. Can you approximate it, a block or half a block or three quarters of a block?
A. It is not that far, it is over a half a block.
Q. On which side of the Rock Island tracks is the section house?
A. South.
Q. Is there anything to obstruct your view in a westerly direction along the Rock Island tracks from your house?
236 A. On the other side the Iron Foundry is about a block away.
Q. Is there anything besides that to interfere with your view of the tracks?
A. No sir.
Q. Where were you on the morning of the accident, December 11, 1915, as this Rock Island train came in?
A. I was at home.
Q. What part of the house?
A. In the dining room.
Q. Tell us what part of the house that is, east, west, north or south?
A. It is the middle room of the long part of the house, but I went from there to the bed room on the west side, there is where I was at when I heard the train.
Q. From your bed room in what direction can you see?
A. You can see west and south and north.
Q. How far could you see in a westerly direction up the tracks?
A. Not any further than the iron foundry there from where I was at.
Q. Did you see this train coming?
A. After it got to the iron foundry I could see it.
Q. Did you hear it coming into Oklahoma City?
A. Yes sir heard it whistle.
Q. Do you know where it was when the whistle was given?
A. Near Western Avenue.
237 Q. Did you see the accident to Mr. Roberts?
A. No sir.
Q. You knew nothing of the accident at all until after it occurred?
A. No sir not until afterwards.

Cross-examination.

By Mr. Bell:

Q. Mrs. Avert when did you first hear of the accident?
A. Just as soon as it was done, as soon as the train stopped.
Q. Were you looking out in that direction?
A. No sir.
Q. How many trains, how many passenger trains go through there a day Mrs. Avert, do you know?
A. I don't know exactly, I never counted them.
Q. Do you know whether or not they whistle every time for Western Avenue or not?

By Mr. Roberts: Objected to as improper cross examination.
By the Court: Sustained, immaterial.
By Mr. Bell: It is a test of her memory on cross examination. We except.

Q. With reference to this train, did you notice it the day before that Mrs. Avert?
A. No sir.
Q. Did you notice it the next day, the following day?
238 A. No sir.
Q. You don't know whether it whistled these other days or not?
A. No sir I don't know.
Q. Your husband you say is section foreman?
A. Yes sir.
Q. And you didn't see the accident?
A. No sir.
Q. At the time the train came to Western Avenue you didn't know any accident was going to occur?
A. No sir.
Q. You didn't know that Mr. Roberts was on the track at all?
A. No sir I didn't know it.
Q. Well did you hear the train whistle any more besides that that day, besides for Western?
A. No sir I never paid any attention to it any more.
Q. It did whistle for Klein and for McKinley up above there?
A. I never heard it.
Q. It did whistle at the crossing of the Railway Company?
A. Where the street cars cross at?
Q. Yes.
A. I never heard it.
Q. Well now where was it when it whistled for Western Avenue, do you know?
239 A. I don't know just where it was at.
Q. You don't know just where it was?
A. No sir I don't know where it was at.
Q. In fact the case is you didn't look out at all?
A. I just heard it whistling.
Q. You didn't look out at the train at all?
A. I looked out after he got by the Iron Foundry after I heard it whistle I went to the window and looked out.
Q. How far is your place, your residence, east of the Oklahoma Railway tracks?
A. About a half a block.
Q. Now where is the iron foundry with reference to the Oklahoma railway track?
A. It is west of the track, just west.
Q. Just west of the Oklahoma Railway track?
A. Yes sir.
Q. You didn't pay any particular attention to the train that day at all did you?
A. No sir.

Q. The claim agent saw you soon after this occurrence didn't he?
A. It was on Monday following.
Q. That's all.

240 Redirect examination.

By Mr. Roberts:

Q. You made a statement of the conditions at the time to the claim agent when he saw you there?
A. Yes sir.
Q. That's all.

Witness excused.

By Mr. Bell: I would like to recall Mrs. Avert for a few more questions.
By the Court: Recall Mrs. Avert.

Mrs. Avert, recalled for further cross-examinaion on behalf of the plaintiff, testified as follows, to-wit:

Recross-examination.

By Mr. Bell:

Q. Mrs. Avert does this represent, this exhibit 2 does it represent pretty well where the tracks run along there?
A. Yes sir.
Q. Your residence is back east of there on the south side of the Rock Island track?
A. Yes sir.
241 Q. How far does your residence sit back from the track?
A. It isn't more than half a block from the street car tracks.
Q. *You* far does it sit back from the Rock Island track?
A. About fifty feet I guess, from here back to the house.
Q. And this iron foundry runs right up to the track, doesn't it?
A. No, sir, there is space between there and the track.
Q. From where you were standing in your room this iron foundry would cut your view off to some extent from the track?
A. Yes, sir, but I went from the middle room there, the dining room, to the west bed room.
Q. Is your west bed room furtherest north or furtherest south?
A. It is furtherest north, it is on the west end of the house.
Q. How far can you see up the track from that?
A. From my bed room where I was at you can't see very far because this cuts the view off.
Q. This foundry is in the way?
A. Yes, sir.
Q. That's all.

Witness excused.

242 Mrs. A. B. JONES, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. State your name.
A. Mrs. A. B. Jones.
Q. Where do you live Mrs. Jones?
A. Oklahoma City.
Q. Were you living in Oklahoma City on December 11, 1915?
A. I was.
Q. Do you remember the occasion of the accident that happened up here at the intersection of the street railway company tracks and the Rock Island tracks on that day?
A. Yes, sir.
Q. Where were you on the morning of the accident?
A. I was on I believe the 40th street car.
Q. Where was the car?
A. It was stopped this side of the Rock Island tracks to let the train pass.
Q. Which side?
A. South side.
Q. About how far from the Rock Island tracks was it when it stopped?
243 A. Well, I can't say because I don't know.
Q. What was your position in the car?
A. I was sitting on the west side of the car in one of the rear seats.
Q. Did you see this old gentleman who was afterwards killed there in this accident?
A. Well, no, I didn't exactly see him because from where I was sitting I couldn't see but just a little. My attention was directed to him.
Q. What directed your attention to him?
A. The motorman.
Q. What was he doing?
A. He was trying to attract his attention by hollering, it sounded to me like he said hey you look out there.
Q. What direction was Mr. Roberts going?
A. I guess he was coming south, he was evidently crossing the tracks.
Q. What direction was he facing?
A. I couldn't see you know, but I just presumed he was going south. He was going across the tracks.
Q. You don't need to tell anything you didn't see, if your position enabled you to see him that is what I want you to tell.
A. I could see the top of his head, so I knew he was coming instead of going.
244 Q. Did you see the Rock Island train at all until after the accident?

A. Oh, yes, yes.
Q. How far up did you see it?
A. I don't know, it was quite a ways up. I was sitting in the car there and I don't know that I heard the train, but something directed my attention and I looked up, I suppose may be the train blew, I don't know because I don't remember, but I heard the train and it was quite a ways up the track.
Q. And all you could see of Mr. Roberts was his head?
A. I could see that he had on a cap pulled down over his head or had his head wrapped up or something like that.
Q. Did you live in that part of town for some time?
A. On Robinson?
Q. Yes.
A. Yes, we have been living in that part of town where we are now for over two years.
Q. You are accustomed to use this car, are you?
A. Oh, no, but I was going out to 39th street that morning.
Q. That is the regular car for you to use in going back and forth?
A. No, I was just going out to see a friend of mine.
Q. That's all.

Witness excused.

245 BERT NEW, called as a witness on behalf of the defendant, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Roberts:

Q. State your name?
A. Bert New.
Q. Where do you work?
A. J. B. Klein Iron & Foundry Company.
Q. Where is that located?
A. On the Rock Island tracks and Ollie.
Q. Where with reference to the intersection of the street railway company tracks and the Rock Island tracks?
A. What is the question?
Q. Where with reference to the intersection of the street railway company tracks and the Rock Island tracks is the foundry located?
A. Well, it is south and west.
Q. How close?
A. Well, it is about 130 or 140 feet I judge from the Rock Island tracks and the intersection of the car tracks, it is probably 260 feet, something like that.

246 Q. I hand you the defendant's Exhibit 3 and ask you if this building out southwest of the intersection of the street railway company tracks and the Rock Island tracks is the foundry you spoke of here?
Q. Yes, sir, that is the place and I am employed in the yard between the foundry and the tracks.

Q. Do you have occasion to cross the intersection there in connection with your work?

A. Well, at times.

Q. Do you know whether or not there are any trespass signs up there?

A. Yes, sir, there is.

Q. How long have they been there?

A. Well, I can't say positive, but they have been there for some time.

Q. About how long?

A. Well, I remember noticing them for some time, I wouldn't say exactly how long, but they have been there for quite a time I am sure.

Q. The jury hasen't been there you know and don't know about how long, several months or a year?

A. I would say several months I would remember seeing them.

Q. About how long prior to the accident would you say they were there?

A. To the best of my knowledge they have been there a year then.

Q. What is the location of those trespass signs?

247 A. Well there is one right at the intersection to the best of my knowledge right at the crossing of the tracks.

Q. Just say directions if you will, north, south, east or west?

A. Well there is one near the crossing of Second Street and Ollie near the car tracks and there is one just across north of the Rock Island tracks and the car tracks.

Q. Calling your attention to plaintiff's Exhibit A I will ask you if the sign with Safety First on it in this exhibit to the north of the Rock Island tracks and west of the street railway tracks is one of these?

A. Yes sir.

Q. And if this sign on the Rock Island C. R. I. & P. Ry. Co., Private Property, keep off, is another one?

A. Yes sir.

Q. Was there any other besides these two at that time or prior to that time?

A. Yes to the best of my knowledge there is another one located along south, it is a smaller sign and located further south than either of these.

Q. Handing you denfendant's Exhibit 2 I will ask you if the no trespassing sign is the one you referred to just now?

A. Yes sir.

248 Q. And if that also shows the board and post of the Rock Island no trespassing or private property sign just north of it?

A. Yes sir.

Q. Do you know whether or not these signs were repainted some time about the date of the accident?

A. Well as to that I can't say.

Q. You don't know?

A. No sir I can't say.

Q. That's all.

Cross-examination.

By Mr. Bell:

Q. You didn't see the accident?
A. No sir I didn't see the accident.
Q. You didn't see the train coming in?
A. Yes I seen the train as it came by.
Q. Do you remember whether it was late or on time?
A. Well to the best of my knowledge it was a little late.
Q. You heard about the accident right afterwards?
A. Yes sir shortly afterwards.
Q. Do you remember about what speed the train was going?
A. No sir I don't.

By Mr. Roberts: Objected to.

249 Q. Mr. New that sign that they have there on that exhibit A was painted over after this accident wasn't it and new lettering put on?
A. Well not that I remember of, I can't say as to that.
Q. Do you see this sign here, is there anything here on this Exhibit A you can see this here, do you know whether that was repainted at the time do you, that that picture was taken?
A. I wouldn't say but I don't think they were. As a general thing as the Rock Island come through they paint their signs and other work all along there. However they had a section house just across there and they generally painted everything as they went through, and they hadn't painted there for some time.
Q. This Exhibit A, you can see there is something on this sign?
A. Yes sir.
Q. And on the other you can see there is something on it just here?
A. I had never noticed that being just here.
Q. Well you can see in the picture it is here, but you can't see any lettering on there at this time can you?
A. No it doesn't show lettering.
Q. And on this exhibit A you can see that can't you?
250 A. Well it looks that way there.
Q. Not is there a pathway leading out from the intersection of these two tracks there in a north westerly direction across the alfalfa field?
A. Well there is a path there that leads across there that people frequently follow, but there is a sign there——
Q. You needn't make any argument?
A. Well I have no argument to make.
Q. Just answer the questions, you say there is a path there that is frequently used?
A. Yes sir.
Q. You never have seen anybody stopped there?

By Mr. Roberts: Objected as incompetent, irrelevant and immaterial.

Q. That's all.

Redirect examination.

By Mr. Roberts:

Q. There are trespass signs there?
A. Yes sir.

By Mr. Bell: Objected to as repetition.
By the Court: Sustained.

Witness excused.

Defendant Rests.

251 R. B. Cook, called as a witness on behalf of the plaintiff on rebuttal, being first duly sworn, on oath testified as follows, to-wit:

Direct examination.

By Mr. Bell:

Q. State your name?
A. R. B. Cook.
Q. What is your business?
A. Stenographer.
Q. Do you remember of the occasion when an inquest was had over the body of A. W. Roberts when the testimony of William Hutchison, Harold Cochran, J. J. Burgoer and E. E. Yates was taken?
A. Yes sir.
Q. Were you the stenographer that took down the testimony?
A. Yes sir.
Q. You took it down correctly?
A. Yes sir to the best of my ability.
Q. I wish you would look over this here, the testimony of Harold Cochran and tell the jury whether or not that is a correct transcript of his evidence as given on that occasion?
A. That is a carbon copy of my original transcript of the evidence in that case and I took it as a stenographer to the best of my ability and transcribed it correctly to the best of my ability, and
252 believe it to be correct.
Q. That is the transcript of your notes you have in your hand (handing witness transcript)?
A. Yes sir.
Q. That's all.

Cross-examination.

By Mr. Roberts:

Q. You took it in the manner in which you state did you Mr. Cook?
A. Yes sir I took it in shorthand and transcribed it to the best of my ability.
Q. And so far as you know it is correct?
A. Yes sir.
Q. You don't mean to say it is absolutely correct free from any errors at all do you?
A. No, no, I make errors all the time like anybody.
Q. Subject to errors like anybody else may make?
A. Yes sir subject to any error in the general line of business.
Q. That's all.

Witness excused.

253 By Mr. Bell: Plaintiff offers in evidence the questions and answers as follows: About how far from the street car crossing was the train? Answer. Well it was right on the street car crossing when it whistled. That was the only time I ever heard it whistle, but the bell was ringing. And the other is this question. You never heard the train whistle when it was west of Western Avenue did you? Answer. Well, I am not sure whether it whistled, I wouldn't say because I am not sure.

By Mr. Roberts: Defendant objects as not of an impeaching character, incompetent, irrelevant and immaterial and the statements not being in such form as to be necessarily contradictory of the witness's statements of the situation in this trial.

By the Court: Overruled.

By Mr. Roberts: Exception.

By Mr. Bell: I will offer in evidence the testimony of Harold Cochran as taken down by Mr. R. B. Cook at the inquest proceedings, as plaintiff's Exhibit D.

By Mr. Roberts: Same objection.

By the Court: Overruled.

By Mr. Roberts: Exception.

254 Thereupon: Said testimony was admitted in evidence and is made a part hereof and is in words and figures as follows, to-wit:

"PLAINTIFF'S EXHIBIT D."

HAROLD COCHRAN, having been duly sworn, testified as follows, in answer to oral interrogatories propounded by—

Mr. Hooker:

Q. State your name.
A. Harold Cochran.
Q. Where do you live?

A. 1808 Linwood.
Q. How long have you lived in Oklahoma City?
A. About five years.
Q. Are you working anywhere?
A. No sir not now.
Q. Do you go to school?
A. No sir.
Q. How long has it been since you worked any?
A. Well I have been out of a job about a week.
Q. Where did you work before that?
A. Harris Produce, 1024 West Second.
Q. Did you see this accident?
A. Yes sir.
Q. Where were you when you saw it?
A. Well, the first time we saw the old man was at Western, and I should think he was about not very far on the north side of the main line when we saw hi*n*, and then I said to Bill, "Look the
255 old man is going to get run over," and about that time he was just stepping over the north rail, and then he rolled out to the side.
Q. Where was he when you first saw him?
A. On the east side, say about five feet on the east side of the east rail of the street car line.
Q. You were at Western Avenue?
A. Yes sir.
Q. And you looked east?
A. Yes sir.
Q. And you saw Mr. Roberts about five feet north of the main line track?
A. Yes sir.
Q. And west of the street car track wasn't he?
A. No sir east of the street car tracks.
Q. East of the street car tracks?
A. East of the street car tracks is where I saw him.
Q. Which way was he going?
A. He was going south.
Q. Where was the train at that time?
A. The train was just about half way—no it wasn't—let's see—it was this side of the street car crossing when we first saw it, or when I first saw him.
Q. About how far from the street car crossing was the train?
A. Well it was right on the street car crossing when it
256 whistled. That was the only time I ever heard it whistle, but the bell was ringing.
Q. And Mr. Roberts was walking south?
A. Yes sir.
Q. Was he on the track when you first saw him?
A. No just a little off the track.
Q. About how far?
A. About five feet north.
Q. And he just continued south did he?

A. Yes sir.
Q. And you saw him when he stepped up on the track did you?
A. Yes sir.
Q. And you couldn't see him any longer?
A. Couldn't see him any longer after he got in the middle of the track. The train shut us out and we couldn't see.
Q. You were walking on the north side of the track were you?
A. Yes sir north side of the main line.
Q. Walking east?
A. Yes sir.
Q. You say the bell was ringing all the time when the train passed you going past Western avenue?
A. Yes sir.

Q. After it left you did the train give any alarm from
257 there on?

A. Right at him it whistled, just this side of the crossing.
Q. How many times did it whistle?
A. Just once that I heard.
Q. You never heard four whistles?
A. No sir.
Q. You weren't paying any attention to the whistles, though were you?
A. I was just watching him.
Q. Did you go on up there?
A. Yes sir run up there as fast as I could.
Q. Did you see the body?
A. Yes sir.
Q. Was he dead or alive at that time?
A. He was dead when we got there.
Q. How far did the train knock him?
A. Well about 30 feet I guess, it just drug him up the track ahead of it and throwed him out to the side.
Q. You never heard the train whistle when it was west of Western avenue did you?
A. Well I am not sure whether it whistled, I wouldn't say because I am not sure.
Q. You were not paying any attention to it?
A. No.
Q. You knew the train was coming?

A. I knew the train was coming, but I wasn't paying any
258 attention to it.

Q. I understood you to say you were walking north of the track that this train was running on?
A. Yes we was north. There is a side track here and there is the main track here (illustrating). We was between the sidetrack and the main track.
Q. You were north of the track that the train was on?
A. Yes sir north of the main track.
Q. How far from the north edge of the track were you walking?
A. Well it is just a little ways. We was on the ties of the side track.

Q. Were you walking on the ties or dirt?
A. Just on the ties and dirt too.
Q. It is level there?
A. Yes sir virtually level.
Q. Where were you when the train passed?
A. We were just about Western when the train passed us.
Q. You were some little distance from the train then were you, five or six feet?
A. Yes sir.
Q. Walking east?
A. Yes.
Q. Do you know whether there was any box cars of any kind on the north track between you and the street car tracks?
A. There was no cars along there only the switch engine
259 up at the mill a block or so away.
Q. Were there any box cars on the track north of the main track between you and the street car track?
A. No sir there was no cars along there that I saw.
Q. Did you see a street car pass, either going north or south just before this train came along there?
A. No sir.
Q. When you got down there were there any street cars standing?
A. Street car on the south side.
Q. Going north?
A. And then after we got there there was one came from the north.
Q. From the time you got on Western Avenue you never saw any street car cross the railroad tracks going either way until after you got up there?
A. No sir there was one came up there and stopped on the north side after we got there.
Q. That was after the train had gone on?
A. Yes sir.
Q. And no car passed until after you got up there?
A. No sir.
Q. I mean no street car?
A. No sir there was a car of the train left on the crossing yet, they couldn't pass.

A Juror: They stopped the train there?
Witness: Yes sir.
Q. There was no train coming from the other way was
260 there?
A. No sir not at that time. The switch engine was up at the mill switching around.
Q. About how far from this crossing?
A. About a block.
Q. How close did it come down?
A. It stopped at the mill and then the switchman came on down.
Q. When?
A. Switchmen came on down to where we were.

Q. Not the engine?
A. No, sir, just the switchmen.

Witness excused.

"Plaintiff's Exhibit D."

Thereupon: Both sides closed their case.
Thereupon: The following motions were made and the following rulings made thereon and exceptions allowed.

261 By Mr. Roberts: Comes now the defendant at the close of the evidence and moves the court to instruct the jury to return a verdict in its favor for the reason that the evidence together with all the reasonable inferences therefrom fails to prove a cause of action in favor of the plaintiff and against the defendant.
By the Court: Overruled.
By Mr. Roberts: Exception.
By Mr. Roberts: Comes now the defendant at the conclusion of the evidence and moves the court to instruct the jury to return a verdict in its favor for the reason that the evidence together with all the reasonable inferences therefrom proves as a matter of law that the deceased A. W. Roberts was guilty of contributory negligence proximately causing his death, and cannot recover in this action.
By the Court: Overruled.
By Mr. Roberts: Exception.

262 The foregoing is all of the testimony offered or introduced by either party at the trial of said cause, together with all objections and motions made, and orders and rulings made thereon and exceptions allowed either party.

263 I hereby certify that the above and foregoing pages contain a true, full, complete and correct transcript of the evidence, together with all exhibits offered or introduced at the trial of the said cause, said evidence having been taken by me in short-hand and said short-hand notes having been correctly and fully transcribed, as set forth in the preceding pages.

E. A. THREADGILL,
Court Reporter.

264 Thereafter, at the conclusion of the introduction of the evidence of both parties in said cause, and prior to the giving of any instruction to the jury by the Court, the plaintiff requested the Court to give to the jury the following written instructions offered in writing to said Court at said time, the said instructions, together with the rulings of the Court and the exceptions to such rulings and the endorsements thereon, being in words and figures as follows, to-wit:

265 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the District Court of said County and State.

No. 19216.

EVA ROBERTS COLE, Adm., Plaintiff,

vs.

JACOB M. DICKINSON, Receiver, Defendant.

Plaintiff's Requested Instructions.

Comes now the plaintiff and requests the court to submit to the jury the following instructions as hereafter numbered:

I. Negligence is a failure to use ordinary care, and by ordinary care is meant, that degree of care that an ordinarily prudent person would use under the same or similar circumstances.

Refused. Covered by general charge to jury. Ex. allowed pltf.
EDWARD DEWES OLDFIELD, *Judge.*

II. Negligence consists also of a violation of a city Ordinance with respect to the speed of trains.

Refused. Covered by general charge to jury. Ex. allowed pltf.
EDWARD DEWES OLDFIELD, *Judge.*

III. If you find from the evidence that A. W. Roberts, deceased, just before and at the time he met his death, was walking along a pathway leading from Western Avenue across defendant's track, and that said pathway was commonly used by the public at said time with the knowledge and acquiescence of the defendant, and if you further find that the agents and servants of defendant in charge of the engine pulling the passenger train, failed to blow the whistle as it was approaching the place where said injury occur-ed, and that said
266 failure, if any, was negligence as above defined, and that said negligence was the proximate cause of the deceased'- injury and death, or, that the agents and servants of the defendant in charge of said engine, were running said engine contrary to the Ordinances of the City of Oklahoma City at a speed greater than twelve miles peer hour, and if you further find that the running of said engine at said speed, if it was so run, was the proximate cause or one of the proximate causes of the deceased'- injury and death, then in either event, you will find for the plaintiff unless you find for the defendant under other instructions herein given you.

Modified & Given. Ex. allowed pltf.
EDWARD DEWES OLDFIELD, *Judge.*

IV. Contributory negligence is the negligence of the injured party contributing with the negligence of the defendant proximately to bring about the injury. And if you find from the evidence that the deceased A. W. Roberts, was guilty of contributory negligence, then you are instructed that the plaintiff cannot recover and you will find for the defendant, unless you find that the fireman on said engine saw the deceased, A. W. Roberts in a place of danger and realized his perilous situation and could have prevented his injury by the use of ordinary care and if you find that the fireman on said engine saw the deceased, A. W. Roberts, in a perilous situation on or near the track of defendant and realized that said Roberts was in a perilous situation, and if you further find that, after he made said discovery, he could have prevented the said A. W. Roberts' injury by the use of ordinary care, then you are instructed that the plaintiff would be entitled to recover even though the deceased was guilty of contributory negligence.

Modified and given. Ex. allowed pltf.
EDWARD DEWES OLDFIELD, *Judge.*

V. If you find for the plaintiff, you will assess the damages at such an amount as, if paid now, would be a reasonable compensa-
267 tion to the plaintiffs for their pecuniary loss on account of the death of said A. W. Roberts.

Given.
EDWARD DEWES OLDFIELD, *Judge.*

LEDBETTER, STUART & BELL,
Attys. for Ptff.

You are instructed that the burden of proof is on the defendant to show that the deceased was guilty of contributory negligence and in determining this issue, you may look to all the evidence introduced in evidence before you.

Refused, covered by general charge to jury. Ex. allowed pltf.
EDWARD DEWES OLDFIELD, *Judge.*

Endorsed: Case No. 19216. In the District Court. Eva Roberts Cole, Adm., Plaintiff, vs. Jacob M. Dickinson, Receiver, Defendant. Requested Instructions by Plaintiff. Filed in District Court, Oklahoma County, Oklahoma, May 18, 1916. James Beaty Court Clerk, by Cliff Myers, Deputy. Ledbetter, Stuart & Bell, Attorneys for Plaintiff.

268 Thereafter and prior to the giving of the instructions of the court to the jury, the defendant requested the court to give to the jury the following written instructions, offered in writing to said court at said time, which instructions were by the court refused or given and to which refusal or other action of the court, there were allowed exceptions, said instructions, as filed, being in words and figures as follows, to-wit:

269 Defendant's Requested Instruction No. 1.

You are instructed that no damages may be allowed in this case for the pain or suffering of the deceased, A. W. Roberts, prior to his death.

Refused, covered by general charge to jury, exception allowed defendant.

EDWARD DEWES OLDFIELD, *Judge.*

Defendant's Requested Instruction No. 2.

You are instructed that what is known as the last clear chance doctrine does not apply in this case for the reason that the negligence of the deceased in coming upon the right of way and crossing the tracks of the defendant railway company was continuous and operative down to the moment of the injury.

Refused and exception allowed defendant.

EDWARD DEWES OLDFIELD, *Judge.*

Defendant's Requested Instruction No. 3.

You are instructed that under the evidence in this case, the deceased, A. W. Roberts, in coming upon the tracks and right of way of the defendant, at the point where the accident occurred, which caused his death, failed to stop or look and listen or take the precautions which a man of ordinary prudence would exercise under the same or similar circumstances and by reason of these facts, was guilty of contributory negligence as a matter of law, which will prevent his recovery in this case.

Refused, covered by general charge to jury and exception allowed defendant.

EDWARD DEWES OLDFIELD, *Judge.*

Defendant's Requested Instruction No. 4.

You are instructed that you will not allow, in this case, if your verdict is in favor of the plaintiff, any damages by reason of pain, mental anguish, loss of society, deprivation of association in
270 family circles of the presence of the deceased, A. W. Roberts, to anyone of the beneficiaries named in the petition herein; the widow, Mrs. Sarah F. Roberts, or the children; Eva Roberts Cole, Barnum Roberts and Claude Roberts.

Given.

EDWARD DEWES OLDFIELD, *Judge.*

Defendant's Requested Instruction No. 5.

You are instructed that before any recovery is permitted to the plaintiff for the beneficiaries named in the petition except the widow, Sarah F. Roberts, there must be proof of actual pecuniary loss by reason of the death of the deceased, A. W. Roberts, and if there is no proof of said pecuniary loss by said children; Eva Roberts Cole, Claude Roberts and Barnum Roberts, you are not authorized to allow to them any sum or sums in case your verdict should be for the plaintiff.

Refused, covered by general charge to jury and exception allowed defendant.

EDWARD DEWES OLDFIELD, *Judge.*

Inst. No. 6.

You are instructed that under the evidence in this case the deceased A. W. Roberts was a trespasser on the tracks of the defendant and the street railway company at the point where he was killed and you will not allow a recovery to the plaintiff herein unless you find that said Receiver of The Chicago, Rock Island and Pacific Ry. Co. by his agents or servants was guilty of wilful or wanton negligence toward him which proximately caused his injury or death.

Modified and given excepted to by deft. Ex. allowed deft.

EDWARD DEWES OLDFIELD, *Judge.*

Requested by Deft.
R. J. ROBERTS,
Atty. for Deft.

271

Inst. No. 7.

You are instructed that a railroad track is a sign of danger and a traveler approaching one with the intention of crossing it must take reasonable precautions to ascertain that it is safe by stopping or looking or listening.

Therefore you are instructed that if the deceased A. W. Roberts under the evidence in this case, approached and attempted to cross the intersection of the street railway tracks with the defendant's tracks on Ollie Street in Oklahoma City without stopping or looking or listening or taking reasonable precautions to ascertain that trains or cars were not approaching said point where he was attempting to cross or that it was safe to cross at said point at that time, you may find that such failure to take such care and precautions consti-

tutes contributory negligence which prevents a recovery for the plaintiff in this action.

Refused, Ex. allowed deft.
EDWARD DEWES OLDFIELD, *Judge.*

Requested by Deft.
R. J. ROBERTS,
Atty. for Deft.

Inst. No. 8.

You are instructed that where the defendant maintains warning or trespass signs prohibiting the public from using its property at any place, the defendant can not be considered by you as having acquiesced in the use of said property in violation of said trespass signs erected and maintained at said point.

Refused and exception allowed deft.
EDWARD DEWES OLDFIELD, *Judge.*

Requested by deft.
R. J. ROBERTS.

Endorsed: 19216. Eva Roberts Cole, Adm., Pltf., vs. Jacob M Dickinson, Recvr., Deft. Instrs. requested by deft. filed in District Court Oklahoma County, Oklahoma, May 18, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy.

272 Thereafter, the court, on his own motion, before argument by counsel, or consideration of the case by the jury, gave the following instructions in writing to the jury as the law of the case, to which said instructions, exceptions were allowed as indicated on said instructions, which said instructions, together with exceptions noted and endorsements thereon, are in words and figures as follows, to-wit:

273 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the District Court.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, Plaintiff,

vs.

JACOB N. DICKENSON, Receiver of the Chicago, Rock Island & Pacific Railway Company, Defendant.

Instructions.

GENTLEMEN OF THE JURY:

This is an action wherein plaintiff prays for judgment in the sum of $3,000.00. She alleges in her petition filed in this cause that on December 11, 1915, between the hours of nine and ten A. M., at the crossing of the tracks of the Oklahoma Railway Company and the Chicago, Rock Island & Pacific Railway Company, A. W. Roberts the father of the plaintiff in this case, and Claude Roberts and Barnum Roberts, and husband of Sarah F. Roberts, in whose behalf this suit has been instituted, was hit and struck by one of the engines of the defendant, Jacob M. Dickenson, receiver of the Rock Island Railway Company, and instantly killed. That at the place where the said A. W. Roberts was killed there was a path and passway leading from Western Avenue on the West and going across said tracks, which had long since, with the knowledge, consent and acquiescence of said Railway Company and said Receiver, been used by the public in passing back and forth, and was recognized on said December 11th, 1915, and long prior thereto, as a public passway by both said C. R. I. & P. Ry. Co. and said Jacob M. Dickenson, receiver. That the agents and servants of said Receiver failed to use ordinary care to keep a look-out along the railway track of defendant. That the place where said accident occurred was in the
274 City of Oklahoma City, a city of about 80,000 inhabitants; and that at said place persons were likely to be killed. That if said agents and servants had used ordinary care in keeping a proper look-out in front of said engine at said time and place they would have discovered said A. W. Roberts in time to have avoided injuring him, by the use of appliances at their command. Plaintiff further alleges in her petition that the said agents and servants failed to ring the bell or blow the whistle of said engine as it was approaching said place where said injury occurred, and failed to blow the whisle for the crossing on Western Avenue; said Western Avenue being a short distance west of the place where the death of the said A. W. Roberts occurred. That the said failure constituted negligence

and want of ordinary care on the part of said servants in charge of said engine; that if said whistle had been blown or the bell had been rung, said accident would not have occurred; that said engine at the time and just before it struck and killed the said A. W. Roberts was running at the rate of twenty and twenty-five miles an hour. That it was negligence and the want of ordinary care on the part of said servants in charge of said engine to run said engine at such speed at said time and place, and contrary to a valid ordinance of the city of Oklahoma City, in full force and effect, said ordinance providing that no engine should be run at a speed exceeding twelve miles per hour. Plaintiff further alleges that said servants in charge of said engine after they discovered that said A. W. Roberts was upon the track of plaintiff and in a position of imminent peril and likely to be struck by said engine, failed to use ordinary care to stop said engine by the use of appliances at their command; that if said servants had used ordinary care to so stop said engine after they discovered the imminent peril and danger of said Roberts,
275 the said engine could have been stopped, would not have hit said Roberts and his death would not have occurred. That at the time of his death the said A. W. Roberts was 84 years old, in good health, strong and vigorous, and in full possession of all his faculties, engaged in trading and farming and actively attending to his business, and earning from $1,000.00 to $1,500.00 per year; that said A. W. Roberts was kindly and provided well for his wife and children, and devoted and applied his earnings to them; and on account of the death of the said A. W. Roberts caused by the negligence of the defendant as aforesaid the said widow and children of the said Roberts have been damaged in the sum of $3,000.00. Plaintiff further alleges that the said A. W. Roberts was in the exercise of due care for his own safety at the time of his said injury, and was not killed on account of any fault or negligence of his own. Wherefore, plaintiff prays for judgment as aforesaid.

2. To the petition of the plaintiff the defendant has filed his answer in which he denies generally the allegations of plaintiff's petition; and for further answer and as separate defense avers that the deceased, A. W. Roberts, while undertaking to approach and cross the line of railroad operated by this defendant in said city of Oklahoma, on said date, set forth in said petition, failed to use the care and prudence of an ordinary man in looking and listening for the approach or passage of engines, trains, or cars at or near said point where he was undertaking to cross, and in failing to exercise the care and prudence of any ordinary man in failing to look and listen for the presence or approach of engines, trains or cars while in the act of crossing the tracks and on the right of way of said defendant.
That if said defendant was negligent as alleges in the petition
276 of the plaintiff, which is not denied for the purpose of this plea, the said alleged negligence was not the proximate cause of the deceased's injuries and death, but that said injuries and death were directly due to and proximately caused by the deceased's own want of care and contributory negligence. Wherefore defendant prays that he be dismissed with his costs.

3. To the answer of the defendant the plaintiff has filed her reply of general denial of the material allegations of new matter contained in said answer.

No. 5. The burden of proof is upon the plaintiff to prove all the material allegations of her petition by a preponderance of the evidence, by which is meant that evidence which is the more satisfactory and which carries with it the greater weight?

The burden of proving contributory negligence is on the defendant by a like preponderance of the evidence, unless the same is shown affirmatively by plaintiff's evidence.

6. Negligence and contributory negligence are relative terms. They relate to the facts and circumstances surrounding the particular transaction in relation to which negligence or contributory negligence is alleged to exist, and to consist either in doing something in a negligent and careless manner, or in failing to do what an ordinarily prudent person would be expected to do under the circumstances, to avoid injury or damage to himself or to others. Contributory negligence is measured by the same standards as negligence in the first instance, and is to be determined from all the facts and circumstances apparent at the time of the alleged negligent act. Contributory negligence can only exist, however, where there is negligence on the part of the other party, and is called contributory negligence because it is a want of ordinary care
277 which contributes to the result of the negligence of the other party and without which the want of care on the part of the other party would not necessarily and naturally have produced the result complained of.

If there was no negligence on the part of the defendant as defined in these instructions, then there could be no liability to the plaintiff and the accident must be considered as unavoidable, or due to the negligence of the deceased, and the question of contributory negligence does not arise in the case; but if the defendant was guilty of negligence as defined in these instructions and the accident could have been avoided by the exercise of ordinary care on the part of the deceased, then the failure to exercise such care and prudence would be what is termed in law contributory negligence and would preclude a recovery against the defendant.

Excepted to by defendant. Exception allowed.

EDWARD DEWES OLDFIELD, *Judge*.

No. 7. If you find and believe from the evidence that the deceased, A. W. Roberts, just before and at the time of his death was walking along a pathway leading from Western Avenue across defendant's tracks, and that said pathway was commonly used by the public at said time, with the knowledge and acquiescence of defendant, and if you find and believe from the evidence that the agents and servants of the defendant in charge of the engine pulling the passenger train failed to give proper warning of its approach as it was approaching the place where said injury occurred; or if you find and believe from the evidence that the agents in charge of

said engine were negligent in the operation of said train in that said engine was driven at a high and reckless rate of speed, as
278 alleged in the petition, and that such negligence, if you so find, was the proximate cause of the death of the deceased, then you will find for the plaintiff, unless you find for the defendant under other instructions herein given you;—

And in determining whether said engine was driven at a high and reckless rate of speed you may take into consideration any violation of the ordinances of the city of Oklahoma City regulating the speed of trains in said City as a circumstance tending to show negligence.

Excepted to by deft. Exception allowed.
EDWARD DEWES OLDFIELD, *Judge.*

No. 8. If you find and believe from the evidence that the deceased, A. W. Roberts, was guilty of contributory negligence, then you are instructed that the plaintiff cannot recover and you will find for the defendant, unless you find and believe from the evidence that the servants operating and controlling said engine saw the deceased, A. W. Roberts in a place of danger and realized his perilous situation and could have prevented his injury by the use of ordinary care; and if you find and believe from the evidence that the said servants of the said defendant, on said engine, saw the deceased A. W. Roberts, in a perilous situation on or near the track of the defendant, and realized that said Roberts was in a perilous situation, and if you further find that after the said servants or either of them made said discovery, the said servant or servants could have prevented the said A. W. Roberts' injury by the use of ordinary care, then you are instructed that the plaintiff would be entitled to recover, even though the deceased was guilty of contributory negligence.

Excepted to by defendant. Exception allowed.
EDWARD DEWES OLDFIELD, *Judge.*

279 No. 9. If you find and believe from the evidence that the path along which the deceased, A. W. Roberts, was walking, across the tracks of the defendant; although commonly used by the public at said time, was not so used with the knowledge and acquiescence of the defendant, then you are instructed that the deceased A. E. Roberts was a trespassor on the tracks of the defendant, and you will not allow a recovery to the plaintiff herein;—unless you further find and believe from the evidence that the defendant, after discovering the perilous situation of the said A. W. Roberts, as hereinbefore instructed, failed to use ordinary care, proximately causing the death of said deceased, in which event you will find for the plaintiff.

Excepted to by deft. Exception allowed.
EDWARD DEWES OLDFIELD, *Judge.*

No. 10. If you find for the plaintiff you will assess th- damages at such an amount as, if paid now, would be reasonable compensation to the plaintiffs for their pecuniary loss on account of the death of the said A. W. Roberts.

However, you are instructed that you will not allow in this case, if your verdict is in favor of the plaintiff, any damages by reason of pain, mental anguish, loss of society, deprivation of association and family circles in the presence of the deceased, A. W. Roberts, to any one of the beneficiaries named in the petition herein; the widow, Mrs. Sarah F. Roberts, or the children, Eva Roberts Cole, Barnum Roberts, and Claude Roberts.

11. You are the sole and exclusive judges of the weight of the evidence, and the credibility of the witnesses, but you are bound by these instructions as to the law applicable to this case. You are not at liberty to select any one or more of the instructions,
280 to the exclusion of the others, but must consider them all together as a whole, as embodying the law of this case.

12. After you shall have retired to consider of your verdict you will select one of your number as foreman and proceed with your deliberations. If you all agree upon a verdict you will cause the same to be signed by your foreman only, however, if you do not all agree upon a verdict, but as many as three fourths of your number do agree those so agreeing will each sign the verdict individually, and return the same into court.

EDWARD DEWES OLDFIELD, *Judge.*

Endorsed: 19216. Filed in District Court, Oklahoma County, Oklahoma, May 20, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy.

281 Thereafter, after being instructed in writing by the court, and having heard the argument of counsel in said cause, jury retired in charge of the proper officer to deliberate upon their verdict.

Thereafter, after deliberation, the jury returned into court, their verdict, awarding the plaintiff the sum of $1,000.00 damages, which said verdict, as returned into court by said jury, together with the endorsements thereon, is in words and figures as follows:

282 In the District Court of the Thirteenth Judicial District of the State of Oklahoma, Sitting in and for Oklahoma County.

No. 19216.

EVA ROBERTS COLE, Adm., Plaintiff,

vs.

JACOB M. DICKINSON, Recvr., C., R. I. & P. Ry. Co., Defendant.

Verdict.

We, the jury, drawn, empannelled and sworn in the above entitled cause, do upon our oaths find for the plaintiff in the sum of One ($1000) Thousand Dollars.

HATHAWAY HARPER.
N. C. CRAIN.
O. W. HIGDON.
FRITZ BLUMENTHAL, *Foreman.*
J. M. SMITH.
JACK HAMAN.
E. C. KNOX.
CHARLES W. BOASIN.
G. E. ROCHFORD.

Endorsed: No. 19216. —— ——, Plaintiff, vs. —— ——, Defendant. Verdict. Filed in District Court, Oklahoma County, Oklahoma, May 20, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy.

283 Thereafter, and within three days of the return of the verdict and the entry of judgment thereon, the defendant filed his motion for a new trial in said cause, at the same term of court, which said motion for new trial, together with the endorsements thereon, is in words and figures as follows, to-wit:

284 In the District Court Within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of R. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver of the Chicago, Rock Island and Pacific Railway Company, Defendant.

Motion for New Trial.

Comes now the defendant, Jacob M. Dickinson, as receiver above named, in the above entitled cause, by his attorneys, the under-

signed, at the same term of court at which the verdict of the jury in said cause was returned and judgment rendered thereon, and within three days thereafter, and moves the court to set aside the verdict of the jury and the said judgment of the court, and hold the same for naught and grant to this defendant a new trial, for the following reasons, materially affecting his substantial rights:

1. On account of irregularity in the proceedings, of the court and the abuse of discretion by the said court in refusing to hold, as a matter of law, that the plaintiff was guilty of contributory negligence under the evidence in the case and to instruct the jury in favor of the defendant because of which fact.

2. On account of excessive damages, appearing to have been given under the influence of passion or prejudice.

3. Because the verdict is not sustained by sufficient evidence.

4. Because the verdict is contrary to law.

5. Because the judgment is not sustained by sufficient evi-
285 dence.

6. Because the judgment is contrary to law.

7. On account of errors of law occurring at the trial and excepted to by the defendant.

8. Because the defendant, by reason of the failure of the court to instruct the jury to return a verdict in its favor, because of the contributory negligence of the plaintiff, is denied due process of law and the equal protection of the laws as guaranteed under the 14th Amendment to the Constitution of the United States and the statutes of the United States made in accordance therewith.

9. Because this defendant has been denied due process of law as guaranteed to him under the constitution of the State of Oklahoma, Section 7, Article 2 therein, in the refusal of the court to give to the jury the peremptory instruction because of the undisputed evidence that the plaintiff was guilty of contributory negligence, which proximately caused his death.

Wherefore, defendant prays judgment of the court.

BLAKE & BOYS,
C. O. BLAKE,
R. J. R.,
Attorneys for Defendant.

Endorsed: No. 19216. Eva Roberts Cole, Admx., v. Jacob M. Dickinson, Rcr. Motion for New Trial. Filed in District Court, Oklahoma County, Oklahoma, May 23, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy.

286 Thereafter, and on the 27th day of May, 1916, there was duly entered in the Journal of said court, the following judgment in said cause:

287 In the District Court in and for Oklahoma County, State of Oklahoma.

Case No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of R. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Clarude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver of the Chicago, Rock Island & Pacific Ry. Co., a Corporation, Defendant.

Journal Entry of Judgment.

At a regular term day of said court, on the 17th day of May, 1916, came on to be heard the above entitled and numbered cause and plaintiff and defendant both by their attorneys, announced ready for trial, and a jury being called for, thereupon came a jury of twelve good and lawful men, Hathaway Harper and eleven others, who after being duly attested, tried and empannelled, were sworn to try said cause, and thereupon the plaintiff, through her attorneys made a statement of her case to the jury followed by *by* a statement made in behalf of defendant by his attorney, and thereupon the evidence was introduced in behalf of the plaintiff and defendant and each side rested, and thereupon, the court having adjourned until the 18th day of May, the court read its instructions to the jury and after argument of counsel, the jury retired in charge of the proper officer to consider of their verdict and, after deliberation, they were discharged until the 19th day of May and after consideration of said case on the 19th day of May they were discharged again until the 20th day of May and after deliberation on the 20th day of May, they returned into open court in charge of the proper officer, the following verdict:

We, the jury, drawn, empannelled and sworn in the above entitled cause, do upon our oaths find for the plaintiff in the sum of One Thousand Dollars ($1,000.00).

288 (Signed) HATHAWAY HARPER.
M. C. CRANE.
O. W. HIGDEN.
FRITZ BLOOMINTHOL.
J. M. SMITH.
JACK HAMAN.
E. C. KNOX.
CHARLES W. BOASIN.
G. E. ROCHFORD.

The nine jurors signing said verdict, being nine of the jury duly empannelled and sworn to try said cause, and it appearing to the court

that nine of said jury have signed and returned said verdict, the said verdict is received and ordered filed and recorded.

It is therefore the order and judgment of the court that the plaintiff, Eva Roberts Cole, Administratrix of the estate of A. W. Roberts, deceased do have and recover for the benefit of Sarah F. Roberts, the widow of the said R. W. Roberts, for herself the said Eva Roberts Cole, Claude Roberts and Barnum Roberts, the only children, heirs and next of kin of said R. W. Roberts, deceased, to be distributed in the same manner as personal property of the estate, from the said Jacob M. Dickinson, Receiver of the Chicago, Rock Island & Pacific Ry. Company, a railway corporation, the said sum of One Thousand Dollars ($1,000.00) and all costs of suit with interest thereon from the 20th day of May, 1916, at the rate of six per cent (6) per annum, and it is the further order of the court that the said Jacob M. Dickinson shall pay to the plaintiff, said sum of One Thousand Dollars and inter-sts and costs out of the property, revenues and money on hand and belonging to said Chicago, Rock Island & Pacific Railway Company.

EDWARD DEWES OLDFIELD, *Judge.*

O. K. as to form.
R. R. BELL,
Attorneys for Plaintiff.
R. J. ROBERTS,
Attorney for Defendant.

Endorsed: Case No. 19216. In the District Court. Eva Roberts Cole, Adm., Plaintiff, vs. Jacob M. Dickinson, Receiver, Defendant. Journal entry. Filed in District Court, Oklahoma County, Oklahoma, May 27, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy. Ledbetter, Stuart & Bell, attorneys for Plaintiff.

289 Thereafter, and on to-wit the 27th day of May, A. D. 1916, the motion for new trial on behalf of the defendant came on for hearing, and after argument of counsel and consideration by the court, was by the court overruled, which order of the court overruling said motion for a new trial on plaintiff's cause of action as set forth in said petition, was, together with endorsements thereon, as follows, to-wit, which said order was recorded in the journal of the clerk of said court, Volume 57, page 67.

290 In the District Court within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of R. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver of the Chicago, Rock Island and Pacific Railway Company, a Corporation, Defendant.

Order Overruling Motion for New Trial.

Now on this the 27th day of May, A. D. 1916, the same being one of the regular judicial days of the May term of the above named court, the above entitled cause coming on for hearing on the motion of a new trial in said cause, and the plaintiff being present by her counsel R. R. Bell, and the defendant being present by his counsel, R. J. Roberts, and the court having heard the argument of counsel, and being well and truly advised herein, overruled said motion.

It is, therefore, by the court, ordered, considered, adjudged and decreed, that said motion be and the same is hereby overruled and the defendant granted an extension of ninety (90) days in addition to the time allowed by law within which to make and serve a case-made, the plaintiff is granted ten (10) days after the expiration of said period within which to suggest amendments to said case-made unless the right to do so is waived in writing, the case-made to be settled and signed upon five (5) days' notice in writing after the expiration of the time allowed by law and extended by order of

291 the court within which said case-made shall be settled and signed unless said time within which to suggest amendments has been waived in writing, in which instance said case-made may be settled and signed upon five days' notice in writing by either party after the said waiver of the right to suggest amendments to said case-made.

It is the further order of the said court that execution be stayed pending the perfection of the appeal from the judgment in said cause and the overruling of the motion for a new trial in said cause, to which ruling of the court overruling said motion for a new trial, the defendant excepts, and to the order of the court, refusing to set aside the judgment in the above cause, the defendant excepts, which exceptions are allowed by the court.

Done in open court at the City of Oklahoma City, Oklahoma County, State of Oklahoma, this 27th day of May, A. D. 1916.

EDWARD DEWES OLDFIELD, *Judge.*

O. K.
L., S. & B.

O. K.
R. J. R.

Endorsed: Filed in District Court, Oklahoma County, Oklahoma, May 27th, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy.

292 Thereafter and on the 5th day of September, A. D. 1916, there was filed with the clerk of said court, a signed order of the judge of said court, granting to the defendant an additional thirty (30) days within which to make and serve case-made in said cause, which order, was duly recorded by said clerk and is in words and figures, as follows, to-wit:

293 In the District Court within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of R. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver Chicago, Rock Island & Pacific Railroad Company, Defendant.

Order Extending Time in Which to Make and Serve Case-made.

Now on this 5th day of September, A. D. 1916, the same being one of the regular judicial days of the September, 1916, term of the above entitled court, the above entitled cause coming on for hearing upon application of the defendant herein for additional time within which to make and serve the case-made in said cause, and it appearing to the court that it has been impossible to prepare the case-made and serve the same within the time heretofore granted, it is

Therefore, by the court considered, ordered, adjudged and decreed that, for good cause shown, the defendant herein shall have an additional thirty (30) days to the time already granted to-wit: an additional thirty days from and after Sept. 9th, 1916, and in addition to the time allowed by law within which to make and serve case-made in the above entitled cause upon the plaintiff herein, and that the plaintiff shall have ten days thereafter within which to suggest amendments thereto, the same to be settled and signed upon five days' notice in writing by either party thereto.

EDWARD DEWES OLDFIELD, *Judge.*

Endorsed: No. 19216. Eva Roberts Cole, Administratrix, vs. Jacob M. Dickinson, Receiver. Order Extending Time in Which to Make & Serve Case-made. Filed in District Court, Oklahoma County, Oklahoma, Sept. 5, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy. Rec. J. 67, Page 440.

294 Thereafter and on the 7th day of October, 1916, there was filed with the clerk of said court, an order, signed by the

judge who tried said cause, extending time in which to make and serve case-made, which, order, together with the endorsements thereon, is in words and figures as follows, to-wit:

295 In the District Court within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver Chicago, Rock Island & Pacific Railroad Company, Defendant.

Order Extending Time in Which to Make and Serve Case-made.

Now on this 7th day of October, A. D., 1916, the same being one of the regular judicial days of the September 1916 term of the above entitled court the above entitled cause coming on for hearing upon application of the defendant herein for additional time within which to make and serve case-made in said cause and it appearing to the court that it has been impossible to prepare the case-made and serve the same within the time heretofore granted, it is,

Therefore, by the court considered, ordered, adjudged and decreed that for good cause shown, the defendant herein shall have an additional thirty (30) days to the time already granted and in addition to the time allowed by law within which to make and serve case-made in the above entitled cause upon the plaintiff herein, and that the plaintiff shall have ten days thereafter within which to suggest amendments thereto, the same to be settled and signed upon five days' notice in writing by either party thereto.

EDWARD DEWES OLDFIELD, *Judge.*

Endorsed: Filed in District Court, Oklahoma County, Oklahoma, Oct. 7, 1916. James Beaty, Court Clerk, by Chas. Colt, Deputy. Recorded in Journal 67, Page 575.

296 The above and foregoing sets out fully and correctly all of the pleadings filed in said cause, all motions filed or made and all rulings and orders made thereon; all exceptions taken by the defendant to such rulings and orders; exceptions by plaintiff all of the evidence offered, introduced or received upon the trial; all admissions and agreements; all the instructions given to the jury; all instructions requested by the plaintiff, rulings of the court thereon and exceptions thereto; all instructions requested by the defendant, rulings of the court thereon and exceptions thereto; the verdict of the jury and the judgment of the court thereon, and exceptions of the defendant thereto; and the same is a full, true, complete and

correct statement and transcript of all the pleadings, motions and all the evidence, findings, judgments and proceedings in said cause.

297 In the District Court within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver of Chicago, Rock Island and Pacific Railway Company, Defendant.

To the above-named plaintiff and her attorneys of record, Ledbetter, Stuart & Bell:

You and each of you will take notice that the above and foregoing case-made in the above entitled cause is tendered to you and each of you as a full, true, complete and correct case-made in said cause, this 21 day of October, 1916.

C. O. BLAKE,
R. J. ROBERTS,
W. H. MOORE,
K. W. SHARTEL,
Attorneys for Defendant.

We hereby acknowledge due, legal and timely service of the above and foregoing case-made upon us this 21st day of October, A. D., 1916.

LEDBETTER, STUART & BELL,
Attorneys for Plaintiff.

298 In the District Court within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver of Chicago, Rock Island and Pacific Railway Company, Defendant.

Waiver of Suggestion of Amendments.

We, the undersigned, plaintiff and attorneys for the plaintiff, in the above entitled cause, hereby waive the suggestion of any amend-

ments to the above and foregoing case-made, and accept the same as a true, full, complete and correct case-made of said cause.

EVA ROBERTS COLE,
Admx., Plaintiff,
By LEDBETTER, STUART & BELL,
Attorneys for Plaintiff.

299 In the District Court within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver of Chicago, Rock Island and Pacific Railway Company, Defendant.

We hereby waive the service of notice of time and place on the signing and settling of the above and foregoing case-made and hereby agree that the same case-made may be settled and signed by the judge who tried the case at any time and place at which it may suit his convenience.

EVA ROBERTS COLE,
Admx., Plaintiff,
By LEDBETTER, STUART & BELL,
Attorneys for Plaintiff.

300 In the District Court within and for Oklahoma County, State of Oklahoma.

No. 19216.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver of Chicago, Rock Island and Pacific Railway Company, Defendant.

I, the undersigned, judge of the above entitled court at the time of the trial of the above entitled cause, as said judge who tried said cause, hereby certify that the above and foregoing case-made was presented to me as a true, full, complete and correct case-made in said cause, and the suggestion of amendments to said case-made having been waived by counsel for the plaintiff and notice of the time and place of presentation of the same to me for signing and settling having also been waived by the plaintiff:

Now, therefore, I, as said judge of said above entitled court, who tried said cause, hereby settle and sign the above and foregoing case-made as a true, full, complete and correct case-made in said cause, and direct that it be attested as such by the clerk of the above court and filed by him therein, to be thereafter withdrawn and delivered to the defendant herein for filing in the Supreme Court of Oklahoma County, State of Oklahoma.

Witness my hand on 2nd day of November, 1916, in *County* Oklahoma County, State of Oklahoma.

EDWARD DEWES OLDFIELD, *Judge.*

Attest:

[SEAL.] JAMES BEATY, *Clerk,*
By CLIFF MYERS, *Dp.*

Filed in District Court of Oklahoma County, Oklahoma, Nov. 2, 1916.

JAMES BEATY,
Court Clerk,
By CLIFF MYERS, *Deputy.*

301-2 In the Supreme Court of the State of Oklahoma.

No. 8758.

JACOB M. DICKINSON, Receiver of Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error,

vs.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Defendant in Error.

We hereby waive the issuance and service of summons in error out of the Supreme Court of the State of Oklahoma in the above entitled cause, and hereby voluntarily enter our appearance in said court in said cause.

EVA ROBERTS COLE,
Admx., Defendant in Error,
By LEDBETTER, STUART & BELL,
Attorneys for Defendant in Error.

Filed in Supreme Court of Oklahoma Nov. 18, 1916.
WILLIAM M. FRANKLIN, *Clerk.*

303 Filed in Supreme Court of Oklahoma Aug. 28, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 8758.

JACOB M. DICKINSON, Receiver of Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error,

vs.

EVA ROBERTS COLE, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Defendant in Error.

Petition for Substitution as Plaintiff in Error.

Comes now The Chicago, Rock Island and Pacific Railway Company and shows to the court that it is a consolidated corporation existing under the laws of Illinois and Iowa and was on April 20, 1915, the owner of, and engaged in operating lines, of railroad in the State of Oklahoma; that on said date Jacob M. Dickinson and H. U. Mudge were, by the United States District Courts for the Northern District of Illinois and for the Western District of Missouri, appointed receivers of said railway and all other property of the said company and immediately took possession thereof and proceeded to operate the said lines of railway as such receivers, under the order of said courts, until the 30th day of September, 1915, on which date said H. U. Mudge resigned, and thereafter the said Jacob M. Dickinson, as sole receiver, continued to retain possession of the said properties and operate the said railroad until the 24th day of June, 1917, on which date he was discharged from the possession and control of said railway and other property, and the same were, under the decree of said courts, thereupon restored to the possession and control of said Railway Company; that by the terms of the said
304-5 decree, the said Railway Company was authorized and required to prosecute or defend all suits, actions and proceedings to which the said receiver, or either of them, was a party, and, subject to certain conditions in the said decree stated, to satisfy all claims against the said receivers, and the Company, therefore, has become the real party in interest in the above entitled action or proceeding.

Said The Chicago, Rock Island and Pacific Railway Company, therefore, moves the court to enter an order permitting it to be substituted for said Jacob M. Dickinson, as receiver of The Chicago, Rock Island and Pacific Railway Company, as plaintiff in error herein and that it be permitted to file a supplemental petition in error and to prosecute this appeal as the real party in interest.

C. O. BLAKE,
Attorneys for the Chicago, Rock Island and Pacific Railway Company.

STATE OF OKLAHOMA,
County of Canadian, ss:

R. J. Roberts, of lawful age, being first duly sworn, upon his oath, states that he is an attorney for The Chicago, Rock Island and Pacific Railway Company; that he has read the above and foregoing document and knows the contents thereof and that the same are true, as he verily believes.

R. J. ROBERTS,
Attorney for the Chicago, Rock Island and Pacific Railway Company.

Subscribed and sworn to before me this 27th day of August, A. D. 1917.

[SEAL.] W. T. MALONE,
Notary Public.

My com. exp. Jan. 9th, 1921.

306 Supreme Court, July Term, 1917, October 2nd, 1917, Twenty-first Judicial Day.

No. 8758.

J. M. DICKINSON, etc.,

v.

EVA ROBERTS COLE, etc.

Now on this day it is ordered by the Court that The Chicago, Rock Island and Pacific Railway Company be substituted as party Plaintiff in Error herein in lieu of Jacob M. Dickinson, etc., Receiver.

307 *Supreme Court Proceedings.*

No. 8758.

J. M. DICKINSON, etc.,

v.

EVA ROBERTS COLE et al.

And now on this Feb. 21st, 1918, the above cause is argued orally and submitted, and it is ordered by the Court that defendant in error be given permission to file brief out of time instanter.

308 Supreme Court, December Term, 1918, December 23rd, 1918, Third Judicial Day.

No. 8758.

J. M. DICKINSON, etc.,

v.

EVA ROBERTS COLE, etc.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

309 Filed in Supreme Court of Oklahoma Dec. 24, 1918 William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Two.

No. 8758.

JACOB M. DICKINSON, Receiver Chicago, R. I. & P. Ry. Company, Plaintiff in Error,

vs.

EVA ROBERTS COLE, Administratrix Estate of A. W. Roberts, Deceased, for Herself and Sarah F. Roberts, Claud Roberts, and Barnum Roberts, Defendant in Error.

Syllabus.

1. Art. 23, Sec. 6, of the Const. of Oklahoma is not merely declaratory of the common law, but requires that the defense of contributory negligence and assumption of risk as to questions of fact in all cases whatsoever, shall at all times be left to the jury, and the finding of the jury upon these defenses is conclusive upon the court.

2. The citizen has no property in a defense and while rights which have accrued to him under the operation of existing laws and have thereby become vested, may not be taken away by change of the rule, he cannot be heard to complain if the rule is changed before any rights have accrued to him thereunder.

3. The running of a train within the limits of a city, in excess of the rate of speed prohibited by ordinance of the city, is negligence per se.

Appeal from the District Court of Oklahoma County.

Edward Dewes Oldfield, Judge.

Affirmed.

C. O. Blake, R. J. Roberts, W. H. Moore, and John E. Du Mars, for Plaintiff in Error.

Ledbetter, Stuart & Bell, for Defendant in Error.

310 POPE, *C.*:

On the morning of December 11, 1915, A. W. Roberts, while attempting to cross the tracks of the Rock Island at the intersection with tracks of the Oklahoma Railway Company in the western part of Oklahoma City, stepped in front of one of the Rock Island eastbound passenger trains, designated as train No. 4, was struck by the engine of the train and was instantly killed. His widow brought suit against the Receiver of the Railroad Company recovering judgment in the District Court of Oklahoma County, and the Receiver brings error.

The uncontradicted evidence shows that the deceased without anything to obstruct his view of the approaching train for more than a block away stepped in front of it and was instantly killed. Were it not for Art. 23, Sec. 6, of the State Constitution which provides this: "the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury," it would be necessary to hold as a matter of law that the negligence of plaintiff precludes a recovery. The receiver devotes the greater portion of a well prepared brief to the above quoted section of the Constitution; his argument being that the provision as construed to warrant the submission of the cause to the jury takes from the receiver a vested right in his defense of contributory negligence, and hence is in violation of the 14th amendment to the Federal Constitution. As said by this Court in the case of St. L. & S. F. Ry. Company vs. Long, 41 Okl. 190, the above quoted Constitutional provision is plain and unambiguous, and plainly makes the question of contributory negligence one for the jury, but in no event would there be any merit in the contention that the Constitutional provision takes away a vested right from the receiver, since the facts on which the action is based arose after adoption of the Constitution. This question has been defi-
311 nitely determined by this Court in the case of Adams against Iten Biscuit Company, 162 Pac. 938. In this well considered case, in passing upon the question raised in the instant case, the Court said:

"It may be safely stated as a general rule that the citizen has no property in a rule of law, and that, while rights which have ac-

crued to him under the operation of existing laws and have thereby become vested may not be taken away by a change of the rules, he cannot be heard to complain if the rule is changed before any rights have accrued to him thereunder."

We think that the above case conclusively answers the contention of the plaintiff in error that no one has a vested right operative against the change of a law in a cause of action or defense which may accrue to him thereunder in the future. It follows that there is no element of vested right in the instant case. It would be an unreasonable construction and one never given, to hold that the fourteenth amendment of the Federal Constitution is prohibitive of all change in legal process and methods, and was intended to render all law unchangeable. Of nothing is the law more jealous than of the right to a jury trial and yet it has been held that to take away jury trials where the right has existed is not in violation of the fourteenth amendment. Walker vs. Sauvinet, 92 U. S. 90; Church v. Kilsey, 121 U. S. 282; Marvin v. Truot, 199 W. S. 212.

There can certainly be no greater change in the law in which a question is transferred for determination from the jury to the Court. It follows therefore that the plaintiff in error's contention that the court should have held that contributory negligence of the deceased precluded a recovery, cannot be sustained.

The uncontradicted evidence shows that the train was running on acquired momentum, steam cut off and was being controlled by the air brakes, that the automatic bellringer was working and the whistle was sounded for the crossing. Both the engineer and
312 fireman were keeping a careful lookout, the engineer whose view was obstructed by the boiler could not see the deceased as he was on the opposite side of the tracks, but he was seen by the fireman. The latter assumed that the deceased would use the care of an ordinarily prudent person and would not attempt to cross the track in front of the train. In this there was no neglect. Elliott on Railroads, Sec. 1153.

The only negligence on the part of the defendant was in the speed of the train, being in excess of the ordinance rate. In this particular only was there a conflict in the evidence, and being controlled by the verdict we must conclude that the train was running at a speed prohibited by ordinance of the city, which constitutes negligence per se. For the running of a train at a rate of speed in excess of that allowed by Statute or ordinance *his* negligence per se.

We are of the opinion that there was sufficient evidence introduced on behalf of the plaintiff to warrant the jury in returning a verdict for the plaintiff below. The cause is therefore affirmed.

Dec. 24, 1918.

By the Court: Adopted in whole.

313 *Certificate.*

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing pages numbered from 1 to 312, inclusive, *is* a true and complete transcript of the

record and all proceedings in said Supreme Court in the cause of The C., R. I. & P. Ry. Co., Plaintiff in Error, vs. Eva Roberts Cole, Admrx., etc., Defendant in Error, No. 8758, as the same remains of record and on file in this office.

In witness whereof, I hereunto set my hand and attach the seal of said Court at the City of Oklahoma City, this 22nd day of January, A. D. 1919.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN, *Clerk,*
By N. C. ORR, *Assistant.*

Endorsed on cover: File No. 26929. Oklahoma Supreme Court. Term No. 843. The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, vs. Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, deceased, for herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts. Filed February 11th, 1919. File No. 26929.

INDEX

Pages

FOREWORD ---------- 1

STATEMENT OF THE CASE ---------- 4

ISSUES IN TRIAL COURT ---------- 5

ASSIGNMENT OF ERRORS AND QUESTIONS PRESENTED -- 8-41

JURY TRIALS, NOT NECESSARY TO DUE PROCESS ---------- 8

SOVIET GOVERNMENT ---------- 9

ARGUMENT, PROPOSITIONS INVOLVED ---------- 10

1st. Plaintiff's intestate guilty of contributory negligence ---------- 12

2nd. The common law defense of contributory negligence was not taken away or changed by the provision of Sec. 6 of Art. 23 of the Oklahoma Constitution ---------- 12

3rd. Contributory negligence is a question of law or a mixed question of law and fact in Oklahoma as elsewhere ---------- 16

4th. The right to immunity by reason of contributory negligence is a substantial vested right ---------- 17

5th. A question of law can not be converted into a question of fact ---------- 18

6th. The guaranty of the equal protection of the laws and due process of law forbids the investment of arbitrary powers of determination and use of variant standards for the test of negligence ---------- 24

II.

7th. Judicial power is jurisdiction, and there can be no judgment without jurisdiction, and a judicial determination, or confession, or admission; and juries have no judicial powers under the Constitution and laws of Oklahoma ---- 26

VESTED RIGHTS, APPELLANT'S CONTENTION---- 17

DUE PROCESS OF LAW---- 18

FACT, DEFINITION OF---- 19-31

UNEQUAL PROTECTION OF LAWS---- 23

LEGISLATIVE POWER ---- 24

JUDICIAL POWER, GRANT---- 26

JUDICIAL POWER, DENIAL---- 27

JURY TRIAL, WHAT CONSTITUTES---- 29

JURY CLASSIFICATION ---- 32

EXHIBIT "A", OPINION OF OKLAHOMA SUPREME COURT 36

EXHIBIT "B", ASSIGNMENT OF ERRORS, U. S. SUPREME COURT ---- 41

EXHIBIT "C", ARTICLE 23 OF OKLAHOMA CONSTITUTION 44

LIST OF CASES CITED: Pages

American Publishing Co. v. *Fisher*, 166 U. S. 464---- 31
Baker v. *Newton*, 27 Okla. 445---- 29
B. & O. S.-W. R. Co. v. *Reed*, 158 Ind. 25, 62 N. E. 488 ---- 18
Bicknell v. *Comstock*, 113 U. S. 268, 28 L. Ed. 962--- 18
Blaker v. *State*, 130 Ind. 203, 29 N. E. 1077---- 33
Capital Traction Co. v. *Hof*, 174 U. S. 1---- 31
C. R. I. & P. Ry. Co. v. *Duran*, 38 Okla. 719---- 16
C. R. I. & P. Ry. Co. v. *Pitchford*, 44 Okla. 197---- 16
C. R. I. & P. Ry. Co. v. *Severy*, 6 Okla. Terr. 153---- 13
Chickasha Cotton Oil Co. v. *Brown*, 39 Okla. 245---- 16

III.

Erwin's Appeal, 16 Penna. 256 32
Frederick Cotton Oil Co. v. *Traver*, 36 Okla. 717 16
Hailey-Ola Coal Co. v. *Morgan*, 39 Okla. 71 15
Hopkins v. *N. C. & St. L. Ry.*, 34 S. W. 1031 30
Huber v. *Guggenheim*, 89 Fed. 598 19
Joneville, City of, v. *Carpenter*, 8 L. R. A. 809 28
Kiley v. *C. M. & St. P. Ry. Co.*, 119 N. W. 314 29
Lowe v. *Kansas*, 163 U. S. 81 21
Luce v. *Garrett*, 64 S. W. 613 31
McKennon v. *Winn*, 1 Okla. Terr. 334 12
Merchants National Bank v. *City of Grand Forks*, 102 N. W. 703 18
Midland Valley R. Co. v. *Bailey*, 34 Okla. 193 16
Missouri, K. & T. Ry. Co. v. *Shepherd*, 20 Okla. 629 .. 16
Murray v. *Hoboken Land Co.*, 18 How. 272, 15 L. Ed. 372 18-20-21
Muskogee Vitrified Brick Co. v. *Napier*, 34 Okla. 618 .. 16
Patton v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 45 L. Ed. 363 3
Pittman v. *City of El Reno*, 4 Okla. Terr. 638 13
Prentis, et al. v. *Atlantic Coast Line Co.*, 211 U. S. 210 21
Pritchard v. *Norton*, 106 U. S. 141, 27 L. Ed. 104 ... 18
St. Louis & S. F. R. Co. v. *Hess*, 34 Okla. 615 16
St. Louis & S. F. R. Co. v. *Loftis*, 25 Okla. 496 16
St. Louis & S. F. R. Co. v. *Long*, 41 Okla. 190 .. 2-13-23
St. Louis, I. M. & S. Ry. Co. v. *McWhirter*, 229 U. S. 265, 57 L. Ed. 1179 18
Smith v. *Acme Milling Co.*, 34 Okla. 439 16
Wall, Ex Parte, 107 U. S. 265 21
Wiseman v. *Tanner*, 221 Fed. 714 32
Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. Ed. 220 .. 24-32

In the Supreme Court of the United States

No. 843.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EVA ROBERTS COLE, as Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

FOREWORD.

In the motion to dismiss or affirm it is charged that the appeal is taken for the purpose of delay. We realize that this charge can be properly met only by the record, but we feel that it may not be improper to declare our sincerity and in a few paragraphs advise the Court of the questions sought to be presented.

In an action for recovery for a personal injury the Supreme Court of the State of Oklahoma has said:

> "The uncontradicted evidence shows that the deceased without anything to obstruct his view of the approaching train for more than a block away stepped in front of it and was instantly killed. Were it not for Art. 23, Sec. 6, of the State Constitution, which provides this: 'the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury,' it would be necessary to hold as a matter of law that the negligence of plaintiff precludes a recovery."

The Court followed and quoted from the case of *St. Louis & S. F. R. Co.* v. *Long*, 41 Okla. 190, in which it was said that it is quite clear from the language used in the constitutional provision referred to that neither the question of contributory negligence nor of assumption of risk nor any question found in the evidence or want of evidence on an issue made by pleading either or both of these defenses can arise in any case as a question of law for the judge.

We assert that the effect given to the constitutional provision by the Oklahoma courts denied the equal protection of the laws and due process of law, and the question of such denial is presented by this appeal.

It has been our boast that ours is a country of laws, and we assert that if the decision here appealed from is sustained the national ideal is destroyed and the principle of soviet government firmly installed, because it matters not that the members of the council of

destiny are sworn as jurors when the judicial power is emasculated from government.

We further assert that the leaving of a single defense, having its foundation in law, to the arbitrary jury determination opens the way for similar treatment of all justiciable questions—marks a change in our system of government. And if it be that the judicial power to prevent injustice—so clearly sustained in *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, 45 L. Ed. 363, wherein it was said that the judge is not a mere moderator of a town meeting, submitting questions to the jury for determination—may be so easily destroyed, we see no restriction which the Constitution would place upon new ventures in government.

STATEMENT OF THE CASE.

As stated, this appeal is brought to determine the constitutionality of Section 6 of Article 23 of the Oklahoma Constitution (Exhibit "C"), as construed and applied by the highest courts of the State. The consideration of the motion of defendant in error involves consideration of the merits of the appeal. While counsel for appellant hope for an opportunity to present it upon its merits by brief and argument, it is necessary here to go sufficiently into the merits to enable the Court to determine the purpose of the appeal and whether or not it is frivolous. In doing so we shall seek to be as brief as the purpose will permit. It seems necessary that we should outline to the Court the substance of the pleadings, evidence and proceedings sufficiently to save the Court a laborious study of the record.

The action was brought by the administratrix, defendant in error, to recover of Jacob M. Dickinson, as receiver, damages for the alleged wrongful death of her intestate.

The petition alleged (Rec. p. 14) that A. W. Roberts was hit by one of the engines of defendant at the crossing of the tracks of the Oklahoma Railway Company and The Chicago, Rock Island & Pacific Railway Company south of Olie Street in Oklahoma City, on account of the negligence of the agents and servants of

defendant in charge of the engine that struck and killed him.

There were various acts of negligence charged which it seems unnecessary that we should enumerate here, inasmuch as in the opinion of the Supreme Court (Rec. p. 149), from which this appeal is taken, it was held that the only basis for recovery was the evidence of excessive speed of the passenger train.

The receiver answered with a general denial and alleged contributory negligence on the part of the deceased, resulting in his death.

Upon the trial there was a conflict in the evidence as to the speed of the train; and, as before stated, the other allegations of negligence were not supported and they are not material to this discussion for the reason that the questions arise upon the allegation of contributory negligence and the evidence, instructions and decision with reference thereto.

The witnesses, both for plaintiff and defendant, were in substantial agreement upon the fact that the intestate was an unusually capable person, in possession of his faculties and especially keen of hearing (Rec. pp. 23-30-45-46-47-50), and walked in front of an approaching passenger train, the view of which was unobstructed, in disregard of various warning signs (Plaintiff's Exhibit "A", Rec. p. 24) and proper crossing signals from the train, and was instantly killed. The place, though much used by the public, was not a public crossing, and the public use was in disregard of the no trespass sign,

shown in plaintiff's Exhibit "A". That the track was clear, the view unobstructed, and the approach of the train audible, was shown by the plaintiff's witnesses.

Upon this state of the pleadings and the evidence the receiver moved the court to instruct the jury to find for the defendant by reason of decedent's contributory negligence. (Rec. p. 128). That instruction was denied by the court, and an exception was allowed to the receiver. And he then requested the court to instruct the jury that the tracks were a sign of danger; that a traveler, approaching with the intention of crossing, must take reasonable precautions to ascertain that it is safe, by stopping, looking or listening, and that if the deceased, A. W. Roberts, attempted to cross without stopping or looking or listening, or taking reasonable precautions, the jury (may) find that such failure to take such care and precaution constituted contributory negligence, preventing recovery. This instruction was also refused, and an exception allowed.

The jury returned a verdict for the plaintiff, and thereupon the receiver moved the court to grant him a new trial upon various grounds, among others being errors of law occurring at the trial and excepted to by the defendant, and that by reason of the failure of the court to instruct the jury to return a verdict in defendant's favor, because of the contributory negligence of the plaintiff, defendant was denied due process of law and the equal protection of the laws, as guaranteed under the Fourteenth Amendment to the Constitution of the United States. (Rec. p. 137.)

The motion for new trial was overruled (Rec. p. 136), and the receiver appealed to the Supreme Court of the State of Oklahoma by petition in error, and that court considered and determined the question of the validity of Section 6 of Article 23 of the Oklahoma Constitution and gave effect to the same, saying in the opinion:

> "The uncontradicted evidence shows that the deceased without anything to obstruct his view of the approaching train for more than a block away stepped in front of it and was instantly killed. Were it not for Art. 23, Sec. 6 of the State Constitution which provides this: 'the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury,' it would be necessary to hold as a matter of law that the negligence of plaintiff precludes a recovery."

For the convenience of the Court we attach a copy of the opinion of the Supreme Court as Exhibit "A" to this brief.

Prior to the rendition of the opinion in the Oklahoma Supreme Court, the receiver had been discharged and an order had been entered in that court substituting this appellant as plaintiff in error. (Rec. p. 143.)

ASSIGNMENT OF ERRORS.

A copy of appellant's assignment of errors in this court is attached to this brief as Exhibit "B". (Rec. pp. 5-6.)

This assignment presents the questions,

First: (a) Does Section 6 of Article 23 deny due process of law?

(b) Did the effect given that section by the State courts deny due process of law?

Second: (a) Does Section 6 of Article 23 deny equal protection of the laws?

(b) Did the effect given that section by the state courts deny equal protection of the laws?

This assignment is now challenged as taken for delay and frivolous, with the assertion that the Federal questions raised have all been decided adversely to our contention. The assertion that the Federal questions raised have all been decided adversely to our contention is not supported by the cases cited in the brief of the defendant in error, in which cases we find no reference to any phase of the questions here sought to be presented, and we know of no decisions even tending to such a determination. It appears to us that either counsel have not understood our contention or have misinterpreted the decisions cited. We have never contended, and do not now contend, that jury trials are necessary either to due process of law or the equal protection of the laws. On the contrary we concede that jury trials are not necessary to due process.

Our only contention as to vested rights is, that under the Constitution and laws of Oklahoma, as construed by the highest courts of the State, the defense of contributory negligence vested at the time of decedent's injury and death, and that *such vested right to that defense* was protected by the Federal Constitution and has been denied without due process and under a procedure denying equal protection of the laws. The vesting of such right, its constitutional protection and the manner of its denial will be discussed in their appropriate place herein.

It is our claim that the effect given to the constitutional provision by the Oklahoma courts denied due process and equal protection by the injection of the soviet principle into the so-called jury trial. That when the defense was "left" to the jury's option without restraint of law or judicial supervision—the right to judicial determination refused, there was a denial of due process of law, because such application of the section by the Oklahoma courts permitted the jury to disregard the law of contributory negligence and denied equal protection, inasmuch as the right to the defense was thus made to depend upon the undirected and unrestrained jury option, and consequent privilege of discrimination, rather than upon the law. That the assurance of due process and equal protection forbids thus *"leaving to the jury"* any or all justiciable questions. That the practice, once recognized, may be extended to all questions of mixed law and fact, even to questions of primary negligence, ownership, inheritance, limitation, qualification, and so on without limit.

ARGUMENT.

Necessary to an understanding of our claims and sincerity is knowledge of the previous decisions of the State courts, in which it has been uniformly held that the common law defense of contributory negligence was not taken away by the constitutional provision here under discussion, but, on the contrary, was recognized and preserved, for it is upon this premise that we assert that the right to the defense is vested. Summarized, the contentions of the appellant involve the following propositions:

PROPOSITIONS INVOLVED.

FIRST.

The evidence shows conclusively, and the State courts substantially held, that plaintiff's intestate was guilty of common law contributory negligence which continued to the instant of the injury which resulted in his death.

SECOND.

The common law defense of contributory negligence was not taken away or changed by the provision of Section 6 of Article 23 of the Oklahoma Constitution.

THIRD.

Contributory negligence is a question of law or a mixed question of law and fact in Oklahoma as elsewhere.

FOURTH.

The right to immunity by reason of contributory negligence is a substantial right which vested concurrently with the act of contribution, and, having vested, can not consistently with the Fourteenth Amendment to the Federal Constitution, be denied.

FIFTH.

Law was at the time of the adoption of the Fourteenth Amendment, and is, a rule of action, and fact was then, and is, something fixed and immutable, giving rise to the question of law; and a question of law can not, consistently with the spirit and purpose of that amendment, be converted into a question of fact so as to remove it from the purview of the judicial power.

SIXTH.

The guaranty of the equal protection of the laws and due process of law forbids the investment of arbitrary powers of determination and use of variant standards for the test of negligence.

SEVENTH.

Judicial power is jurisdiction, and there can be no judgment without jurisdiction, and a judicial determination, or confession, or admission; and juries have no judicial powers under the Constitution and laws of Oklahoma, and there has been no pretense of conferring such powers as to this question.

We will endeavor to discuss these several propositions separately, but their near relation will make separation difficult and necessitate more or less commingling in this short brief.

First.

In support of the first proposition we think it unnecessary to enter into a discussion of the evidence, the Supreme Court having said in its opinion:

> "The uncontradicted evidence shows that the deceased without anything to obstruct his view of the approaching train for more than a block away stepped in front of it and was instantly killed. Were it not for Art. 23, Sec. 6, of the State Constitution which provides this: 'the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the injury,' it would be necessary to hold as a matter of law that the negligence of plaintiff precludes a recovery."

Second.

In the case of *McKennon* v. *Winn*, 1 Okla. Terr. 334, the territorial supreme court said:

> "* * * * when people from all parts of the United States on the 22nd day of April, 1889, settled the country known as Oklahoma * * *, they brought into Oklahoma with them the established principles and rules of the common law as recognized and promulgated by the American courts, and as it existed when imported into this country by our early settlers and unmodified by American or English statutes."

Under such common law contributory negligence is a bar to recovery, and it has at all times been negligence *per se* for one, in the possession of his natural faculties, voluntarily to go into a place of known danger without exercising that care for his own safety which reasonable

prudence requires. *C., R. I. & P. Ry. Co.* v. *Severy*, 6 Okla. Ter. 153; *Pittman* v. *City of El Reno*, 4 Okla. Terr. 638.

In *St. L. & S. F. R. Co.* v. *Long*, 41 Okla., at page 190, on the authority of which judicial cognizance was denied in this case, the Oklahoma Supreme Court said:

> "Section 6, Art. 23 (sec. 355 Williams' Ann. Ed.), Constitution of Oklahoma, reads:
>
> " 'The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall at all times be left to the jury.'
>
> "That these defenses in all cases are questions of fact and must be left to the jury, see also the following cases: *Chicago, R. I. & P. Ry.* v. *Beatty*, 27 Okla. 844, 116 Pac. 171; *Independent Cotton Oil Co.* v. *Beachan*, 31 Okla. 384, 120 Pac. 969; *Phoenix Printing Co.* v. *Durham*, 32 Okla. 575, 122 Pac. 708, 38 L. R. A. (N. S.) 1191; *Chicago, R. I. & P. Ry. Co.* v. *Hill*, 36 Okla. 540, 129 Pac. 13, 43 L. R. A. (N. S.) 622; *Dewey Portland Cement Co. v. Blunt*, 38 Okla. 182, 132 Pac. 659.
>
> "Neither the defense of contributory negligence nor the defense of assumption of risk can arise, of course, unless the defendant has been guilty of negligence which, but for one or both of these defenses, would render it liable for damages to the plaintiff. Until then there is nothing against which to make defense; but, if there be evidence from which the jury may find the defendant guilty of such negilgence, these defenses, if they exist in fact, are available to the defendant. *The section of the Constitution just quoted expressly recognizes these defenses as they existed, especially in their aspects as*

questions of fact, at the time of the adoption of the Constitution although we express no opinion as to whether statutory change could be made; *but it is quite clear from the language used that neither of them nor any question found in the evidence or want of evidence on an issue made by pleading either or both of these defenses can arise in any case as a question of law for the judge.*" (italics ours). The judge no doubt should, in leaving these defenses to them, inform the jury what these defenses are, that is, should define contributory negligence and assumption of risk in relation to the evidence and where the burden of proof lies in proper instructions, and inform them of the legal effect of same. The jury no doubt should, as a matter of fact, infer contributory negligence and assumption of risk or the absence thereof where the courts of this jurisdiction, as a matter of law, were accustomed to infer or presume the same prior to the adoption of this section; and it may be that the judge should advise the jury of such inferences and presumptions; *but the jury alone can, with binding effect, say what inferences and presumptions of fact may be indulged in determining these defenses.* (italics ours). The language of this section and the cases hereinbefore cited do not permit any other interpretation or construction; and there is nothing in the history of the provision under consideration to suggest any other intent on the part of the convention that framed or the people who adopted the construction.

"It is urged by counsel for defendant in brief and oral argument that this provision of our Constitution is merely declaratory of the pre-existing law; but this contention is conclusively answered by the cases hereinbefore cited, and especially that of

Independent Cotton Oil Co. v. *Beachan*, 31 Okla. 384, 120 Pac. 696, in which it is said:

"'Another point is made that the proposition that our constitutional provision, providing that the defense of contributory negligence or assumption of risk is a question of fact to be submitted to the jury, is merely declaratory of the common law that, when the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence whether negligence or contributory negligence exists. Citing *Kiley* v. *C., M. & St. P. Ry. Co.*, 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. To give the Wisconsin provision the construction contended for by the plaintiff in that case would have the effect of conferring judicial power on juries, in violation of Article 7, Sec. 2, of the Constitution of Wisconsin, which confers all judicial power upon designated courts. In the case at bar the provision under discussion is a constitutional provision, and, of course, it is not necessary to resort to construction to harmonize it with any other enactment. Upon its face, it seems to be plain and unambiguous. It provides that the "defense of contributory negligence and of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall at all times, be left to the jury."'"

In the case of *Hailey-Ola Coal Co.* v. *Morgan*, 39 Okla. 71, the court said:

"The law makes contributory negligence a valid defense, and the defendant had a right to rely upon the same and to have that issue submitted to the jury for its determination, and under the law of this state that defense if sustained, would prevent a recovery by plaintiff."

In the same case the court also said:

"There can be no recovery by a plaintiff who has been guilty of contributory negligence."

See also: *Frederick Cotton Oil Co.* v. *Traver*, 36 Okla. 717.

C., R. I. & P. Ry. Co. v. *Duran*, 38 Okla. 719.
St. L. & S. F. R. Co. v. *Loftis*, 25 Okla. 496.
M., K. & T. Ry. Co. v. *Shepherd*, 20 Okla 629.
C., R. I. & P. Ry. Co. v. *Pitchford*, 44 Okla. 197.
Chickasha Cotton Oil Co. v. *Brown*, 39 Okla. 245.

Third.

There is no inherent difference between negligence of plaintiff and negligence of defendant,—both are contributory; and the Oklahoma Supreme Court has frequently and expressly recognized the rule that whether or not an act is negligent, is a question of law only, except where the minds of reasonable men might differ with reference thereto.

M., K. & T. Ry. Co. v. *Shepherd*, 20 Okla. 629.
St. L. & S. F. R. Co. v. *Loftis*, 25 Okla. 496.
Muskogee Vitrified Brick Co. v. *Napier*, 34 Okla. 618.
Midland Valley R. Co. v. *Bailey*, 34 Okla. 193.
Smith v. *Acme Milling Co.*, 34 Okla. 439.
St. L. & S. F. R. Co. v. *Hess*, 34 Okla. 615.

That these decisions of the Oklahoma Supreme Court were in accordance with the established rule is clearly seen.

In Shearman & Redfield's Law of Negligence, Sixth Edition, Vol. 1, Sec. 52, it is said:

> "The definition of negligence, already given, shows upon its face that negligence is a question of mingled law and fact (citing many authorities). It includes, indeed, two questions: (1) whether a particular act has been performed or omitted, and (2) whether the performance or omission of this fact was a breach of a legal duty. The first of these is a pure question of fact; the second a pure question of law.

In Sec. 56 of the same volume, those authors say:

> "The courts have sometimes used such broad language as to the necessity of leaving the questions of negligence to the jury, that it might be inferred that every case must be so left; but this is not true. When the facts are clearly settled, and the course which common prudence dictated can be so clearly discerned that only one inference can be drawn, it is not only the duty of the court to set aside a verdict contrary to such inference, but to take the case away from the jury and direct a verdict or a nonsuit, as the case may require."

Fourth.

The right of the defense of contributory negligence and to such defenses as a bar to recovery became a substantial vested right, protected by the Federal Constitution, at the time of the occurrence upon which the action was brought.

Cooley's Const. Limitations, 521.

Bicknell v. *Comstock*, 113 U. S. 268, 28 L. Ed. 962.
St. L., I. M. & S. Ry. v. *McWhirter*, 229 U. S. 265, 57 L. Ed. 1179.
Pritchard v. *Norton*, 106 U. S. 141, 27 L. Ed. 104.
B. & O. S.-W. R. Co. v. *Reed*, 62 N. E. 488, 158 Ind. 25.
Merchants National Bank v. *City of Grand Forks* (Minn.), 102 N. W. 703.

Fifth.

We contend that the guaranty of due process and the equal protection of law assures a continuance of a government of impartial laws and the existence of judicial tribunals to construe and apply them, and that the amendments having had in view principles, conditions and meanings in jurisprudence as known at the time of the adoption, evasion, by attempts at violation of those meanings, is forbidden. McGehee, Due Process of Law, p. 59.

In *Murray* v. *Hoboken Land, etc., Co.*, 18 How. 272, 15 L. Ed. 372, it is said:

> "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by law of the land,' in Magna Charta. Lord Coke, in his commentary on those words (2 Inst., 50), says they mean due process of law.
> In the same case this court said:
>
> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not

consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; * * *."

At common law and in all civilized countries, the distinction between questions of law and questions of fact was recognized. And that which at the time of the adoption of the Fourteenth Amendment was a question of law must, in its contemplation and meaning, continue to be such. Likewise, a then question of fact must continue to be such.

Law was at the time of the adoption of the Fourteenth Amendment, and still is, a rule of action. Fact then was, and still is, in the language of the courts, "something out of which the question of law arises"; "something fixed and immutable." *Huber* v. *Guggenheim*, 89 Fed. 598, 601.

"Nothing is a question of fact which is not a question of the existence, reality, truth of something; of the *rei veritas*."

Thayer's Treatise on Evidence at the Common Law, p. 191.

"By law, 'we mean, at all events, a rule or standard which it is the duty of a judicial tribunal to apply and enforce.'"

Same author, p. 192.

"* * * nothing is law that is not a rule or standard which it is the duty of judicial tribunals to apply and enforce."
Same author, p. 193.

The power of the people in their state constitutions is very great. But there is no power of the people to change the immutable. Unless that which was a question of law at the time of the adoption of the Constitution continue to be such, the provisions of the Constitution fail in their mission.

Given the power to reverse the quality and order of things as universally known and recognized, no legislative body need suffer any embarrassment from constitutional restrictions. If we do not recognize the accepted meanings of words and the inherent properties and characteristics of things as they were known and recognized at the time of the adoption of the Federal Constitution and amendments, all constitutional provisions can be defeated by the creation of a new dictionary and a new encyclopaedia.

Any defense is such by virtue of law, and therefore as a matter of law.

The "leaving" of questions which are inherently questions of law to the jury, permits the jury to disregard the general "rule of action prescribed by the supreme power" and prescribe rules of action, in addition to determining the questions of fact to which the rules are to be applied.

The United States Supreme Court has said in *Murray* v. *Hoboken Land, etc., Co., supra,* that we must respect

> "those settled usages and modes of proceeding existing in the common law and statute law of Eng-

land, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

In *Lowe* v. *Kansas*, 163 U. S. 81, it is said that that was due process of law which was

> "in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases."

The proceedings must be sanctioned by immemorial usage. *Ex Parte Wall*, 107 U. S. 265.

The guaranties contained in the Fourteenth Amendment are to be construed in accordance with the commonly accepted meaning, at the time of its adoption, of the words used therein, and mean that no one shall be so deprived without a judicial determination of the question of his right, save in those exceptional cases where, under established usage, administrative determination was sanctioned. We think such were limited to debts due the Crown. *Murray* v. *Hoboken Land, etc., Co., supra.* And with those exceptions due process of law, as universally understood, is provided only where such judicial determination is afforded.

One of the most common methods of attempting to deprive persons of property without due process of law is that relating to rates for public service, evidenced by designating as judicial that which is inherently legislative.

In *Prentis et al.* v. *Atlantic Coast Line Co.*, 211 U.

S. 210, this court declared that neither the legislative nor judicial function can be changed by legislation, and on page 226 said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

Now, if the legislative body may effectively declare that a question of law is a question of fact, can it not, with equal effect, declare a judicial question legislative, or a legislative act executive or judicial, or make any other or different shift or arrangement for deranging and confusing the governmental functions and preventing the application of constitutional provisions?

The purpose of the attempt to make the questions of contributory negligence and assumption of risk questions of fact to be at all times and in all cases left to the jury was to relieve the jury from the control and restraint that resulted from the law in its authoritative application. No more effective method of destroying the universality, certainty and generality of the law could be conceived. That which would be negligence of defendant because so found by a jury, would not be negligence of plaintiff because found not to be by the same jury. The constitutional provision should not thus be subordinated to training, prejudice and digestion, nor constitutional rights be destroyed by changing the meaning of words.

If there were no law there could be no due process of law. If the state had provided that all questions shall be at all times and in all cases questions of fact and "left" to the jury, could the government resulting from such a system be a constitutional government, would it be republican in form, and could it administer due process of law? That system would no more than carry on the principle of the provisions of Sec. 6 of Art. 23, and would, in principle, go no further than that provision.

The Constitutional Convention unquestionably had the power to vary the common law and to reject the rules making assumption of risk and contributory negligence defenses, but has not done so. *St. L. & S. F. R. Co.* v. *Long,* 41 Okla. 190, 191, *supra.* It might have conferred judicial power upon juries, as has been done in criminal cases in Indiana under the constitution of that state, but it did not do so. The Constitution, recognizing the defense, merely attempts to convert it into a question of fact to be "left to the jury", and is so construed. As construed, its practical effect is to order that *whether it shall be a defense* shall be left to the jury.

In *St. L. & S. F. R. Co.* v. *Long, supra* (41 Okla. 190), the court said:

> "* * * but it is quite clear from the language used that neither of them nor any question found in the evidence or want of evidence on an issue made by pleading either or both of these defenses can arise in any case as a question of law for the judge."

Sec. 1 of Art. 5 of the Oklahoma Constitution provides:

> "The legislative authority of the state shall be vested in a legislature, consisting of a senate and a house of representatives; but the people reserve to themselves the power to propose laws and amendments to the constitution and enact or reject the same at the polls independent of the legislature, and also reserve power at their own option to approve or reject at the polls any act of the legislature."

Sec. 59 of Art. 5 provides:

> "Laws of a general nature shall have a uniform operation throughout the state, and where a general law can be made applicable, no special law shall be enacted."

Any thought that acts of juries in determining the question are legislative, is further negated by the fact that the jury's pronouncement is after the rights of the parties have attached.

Sixth.

The provision effects inequality of protection by testing the acts of the two parties to the same action by differing standards. What is negligence of one party is, if there is equality, negligence of the other. But only the jury may say what is contributory negligence, even though the acts of plaintiff and defendant shall be mutual, equal, concurring and identical. They are thus tested with the "evil eye and unequal hand" spoken of in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. Ed. 220. The question of the negligence of the one com-

plaining of results can not be the subject of the full exercise of judicial power accorded to the acts of the other—a denial of both equality and due process. For we think that that can hardly be due process which in one action submits the question of negligence of the one litigant to a qualified judicial tribunal, while denying judicial cognizance as to questions of negligence of the other. Furthermore, the provision singles out but two questions, viz., assumption of risk and contributory negligence, leaving all other questions to higher judicial control and depriving the litigants, as to those questions, of rights common to all others.

It is an attempt to confer despotic power and in direct conflict with the guaranty of the equal protection of the laws.

> "The conception of law is opposed to all merely arbitrary or capricious action on the part of the state depriving individuals of life, liberty, or property. Early in English history an appeal was made in this conception in petitioning parliament for a reversal of a bill of attainder, but, according to the British constitution, the authority of parliament is absolute, and the idea of the intrinsic necessity of equality or generality could not be developed as applied to acts of parliament, although in substance it was employed to restrain the quasi-legislative activity of municipal bodies.
>
> "Under the American theory of constitutional government, in which constitutions are a restraint even on the legislature, the idea has had a more fruitful development. Purely arbitrary decress or enactments of the legislature directed against individuals or classes are held not to be 'the law of the

land,' or to conform to 'due process of law.' The conception comes clearly to the front in Mr. Webster's definition of 'law of the land, * * * .' 'Due process of law within the meaning of the (Fourteenth) Amendment,' said the Federal Supreme Court, 'is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' 'By the law of the land,' said the Michigan court, 'we understand laws that are general in their operation, and that affect the rights of all alike, and not a special act of the legislature, passed to affect the rights of an individual against his will and in a way in which the same rights of other persons are not affected by existing laws. * * * 'The clause,' " 'law of the land' ", said Mr. Justice Catron, when a member of the Supreme Court of Tennessee, 'means a general and public law, equally binding upon every member of the community.' In a late case, the same court, in order to bring out the constitutionality of legislative classification, preferred to define the phrase as meaning a law 'which embraces all persons who are or may come into like situation and circumstances.' "

McGehee, Due Process of Law, pp. 59-60.

By Sec. 1 of Art. 7 of Williams' Constitution, it is provided:

> "The judicial power of this state shall be vested in the senate, sitting as a court of impeachment, a Supreme Court, District Courts, County Courts, Courts of Justices of the Peace, Municipal Courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law."

The Supreme Court of Wisconsin, in the application of a statutory provision of that state enacted at about the same time as the adoption of this constitutional provision, and providing that in actions against railroad companies the questions of negligence and contributory negligence shall be for the jury, said:

> "It is contended that the legislature intended to deprive the courts of their judicial functions, as conferred on them by Section 2, Art. 7, of the State Constitution, by the provisions of subdivision 5, and to confer such functions on juries, as they are constituted by the State Constitution. The powers conferred on courts and juries by these constitutional provisions were well defined in the established system of jurisprudence in this country at the time of their adoption. This court interpreted these constitutional provisions as conferring on court and jury those well-defined as they existed, and had been repeatedly exercised by court and jury, under the common law. In *Callahan* v. *Judd*, 23 Wis, 343, in speaking of the significance of the phrase 'judicial power as to matters of law and equity,' employed in the Constitution, as applied to the courts, the court declares: 'In actions at law they had the power of determining questions of law, and were required to submit questions of fact to a jury. When the Constitution, therefore, vested in certain courts judicial power in matters of law, this would be construed as vesting such power as the courts, under the English and American system of jurisprudence, had always exercised in that class of actions. It would not import that they were to decide questions of fact, because such was not the judicial power in such actions. And the Constitution does not attempt to define judicial power in these matters, but speaks of it as a thing existing and understood. See,

also, *Oatman* v. *Bond*, 15 Wis. 21; *Klein* v. *Valerius*, 87 Wis. 54, 57 N. W. 1112, 22 L. R. A. 609; *City of Janesville* v. *Carpenter*, 77 Wis 288, 46 N. W. 129, 8 L. R. A. 808, 20 Am. St. Rep. 123. Under the system of law as it then existed it devolved on the court to determine the legal sufficiency of the evidence tending to prove a fact; and, when the court had judicially ascertained that the evidence adduced tended to establish the constituent facts of the matter at issue, it then devolved on the jury to determine whether, upon the evidence, the fact, was satisfactorily proven. The powers of the court and jury in the administration of the law in these respects were distinct and well defined at the time of the adoption of our Constitution, and because vested in the court and jury by its provisions. They cannot be abrogated or modified by legislative action (to the extent of impairing, in any degree, the judicial power). Under the Constitution courts have become vested with the judicial power to determine the questions of the legal sufficiency of the evidence to establish the rights of the parties at issue, and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries.

"Did the legislature intend by the provisions of subdivision 5 of this act to confer judicial power, vested in the court, on the jury? It declares: 'In all cases under this act the question of negligence and contributory negligence shall be for the jury.' In their general sense the words are but a declaration of the law as it exists, namely, that when the court has found that there is legal evidence, tending to show negligence or contributory negligence, it is for the jury to determine from the evidence adduced whether negligence or contributory negligence exists. This interpretation of the provision does not

make a change in the law, and cannot affect the rights of any person."

Kiley v. *C., M. & St. P. Ry. Co.*, 119 N. W. 314.

The Oklahoma Supreme Court, in the case of *Baker* v. *Newton*, 27 Okla. 445, said:

"What constitutes a trial by jury as guaranteed by the Constitution? This question has been under investigation by many courts of the nation, both state and federal, and there is unanimity in the opinions that the right of trial by jury secured by the constitutions of the various states is simply the right to a trial by jury constituted substantially and with the same elements and incidents as existed when the Constitution was adopted?"

That opinion also quotes from Cooley's Const. Limitations, p. 589, as follows:

"All the state constitutions preserve the right of trial by jury, for civil as well as for criminal cases, with such exceptions as are specified, and which for the most part consist in such cases as are of small consequence, and are triable in inferior courts. The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before. But in doing this, they preserve the historical jury of twelve men, with all its incidents, unless a contrary purpose clearly appears."

The common law right to due process, a part of the law of the land preserved by the Federal Constitution, had firmly imbedded in it, as an integral part, the right to have juries instructed and controlled, as to matters

of law, by courts on which judicial power had been conferred.

In the case of *Hopkins* v. *N., C. & St. L. Ry.*, 34 S. W. 1031, the Tennessee Supreme Court said:

> "It may be well to understand, at the threshhold of this investigation, what is meant by the right of trial by jury, as guaranteed by the constitution. The late Mr. Justice Miller, in his lectures on Constitutional Law, quotes with approval the following from the Encyclopaedia Britannica, in its article 'Jury', to wit: 'The essential features of trial by jury, as practiced in England and countries influenced by English ideas, are the following: The jury are a body of laymen, selected by lot, to ascertain, under the guidance of a judge, the truth, in questions of fact, arising either in civil litigation or a process. * * * Their province is strictly limited to questions of fact, and within that province they are still further restricted to the exclusive consideration of matters that have been proved by evidence in the court of the trial. They must submit to the direction of the judge as to any rule or principle of law that may be applicable to the case,' etc. Again, Forsyth, in his History of Trial by Jury, published in 1852, says: 'The distinctive characteristic of the system in this: That the jury consists of a body of men taken from the community at large, summoned to find the truth of disputed facts. They are to decide upon the effect of the evidence, as thus to assist the court to pronounce a right judgment; * * * They are not, like the judges, members of a class charged with the duty of judicial inquiry. They are taken from varied pursuits, to make a special inquiry, and return to their ordinary avocations when this labor is over.' "

The jury trial must be under the superintendence of a judge empowered to instruct them in the law and to set aside their verdict if, in his opinion, it is against the evidence or the law.

Baker v. *Newton*, 27 Okla. 446.
American Pub. Co. v. *Fisher*, 166 U. S. 464.
Capital Traction Co. v. *Hof*, 174 U. S. 1.
Luce v. *Garrett* (Ind. Ter.), 64 S. W. 613.

Section 1 of Art. 7 is unusual in its generous distribution of the judicial power, but it has given none to the jury, and there is nothing in the State Constitution or decisions justifying a thought that the State meant to depart from the time honored practice of "leaving" questions of law to the judges.

Fact being, as we have shown, something fixed and immutable, rights may be determined by applying the principles of law thereto; and all people may, in theory, determine, and have determined, their rights under rules universal in their operation and having potential existence at the time when such rights vest and such obligations attach. If a question of fact may be created out of attenuated law, and depend for legal recognition upon the uncertain action of an undirected jury, the citizen has no certain rule for his guidance. That is not a fact which awaits the birth of its creator.

The intention was that the jury shall be bound by no law. Courts may commit error in the application of a principle of law to the controversies of others and their errors may be reviewed on motion and on appeal. But a jury, under this provision, can commit no error

as to these litigants,—the will of a three-fourths majority is superior to the law.

The arbitrary character of the jury power is not excused or justified by any classification. No open regard is given to classes under it, but it secretly contemplates the ordinary jury classification between the plaintiff and the defendant. The jury power is arbitrary and retrospective and could not stand as legislation. McGehee on Due Process of Law, p, 59.

In *Edwin's Appeal*, 16 Penna. 256, the court said:

> "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than to any other attribute of government."

City of Janeville v. *Carpenter*, 8 L. R. A. 809.

Here is an attempt to give a smaller number of men than constitute a legislature, greater power.

In *Yick Wo* v. *Hopkins*, 118 U. S. 373, the court said:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in equal circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In Wiseman v. *Tanner*, 221 Fed., at page 714, the court said:

"The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statute when put into operation, and not from its proclaimed purpose."

The nature of the power attributed to juries under Sec. 6 of Art. 23 of the Oklahoma Constitution is illuminated by contrast with the decisions of the Supreme Court of Indiana, where juries are, under the constitution, given judicial power in criminal cases; and of the Supreme Court of Wisconsin under the statute of that state providing that in actions against railroad companies all questions of negligence and contributory negligence shall be for the jury.

In Indiana the Supreme Court has repeatedly held that, while the Constitution of the State gives to the jury in criminal cases the right to determine the law, it is the duty of the court to see that their verdicts are in accordance with the law, that they may determine it correctly.

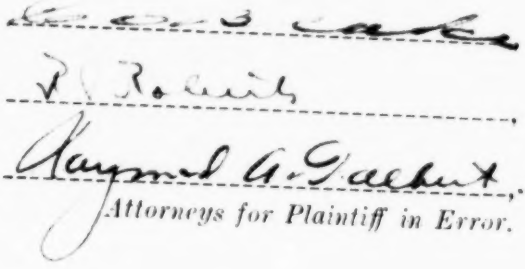
In the case of *Blaker* v. *State*, 130 Ind. 203, 29 N. E. 1077, the court said:

"The constitution gives to juries in criminal cases the right to determine the law as well as the facts. It does not, however, give to them the right to disregard the law. To aid them in correctly determining the law, it is made the duty of the court to instruct them. They have no more right, in determining the law, to disregard and ignore the court's instructions arbitrarily and without cause,

than to disregard and ignore the evidence, and determine the facts arbitrarily and without cause."

It must be conceded that, if Sec. 6 of Art. 23 of the Oklahoma Constitution is sustained, greater powers are conferred upon juries thereby than have ever been given to juries, or even to courts, elsewhere. The convention has attempted to avoid the question of legal sufficiency by destroying the quality of a question of law. If the effort at conversion has not been effected, the section results in unequal application of the laws, and a denial of the right to a judicial determination by due and orderly procedure surrounded with and attended by the respect for legal principles which the Constitution and laws secure to litigants generally. It should be condemned for those reasons, and justice should be administered between litigants having controversies involving questions of negligence, contributory negligence and assumption of risk, with the same safeguards against partiality and oppression that characterize the general administration of law under our form of government. Unquestionably the provision means just what it says and was intended to make the jury the arbiter in all cases involving those questions as the courts of this state have interpreted it. So interpreted and applied, it is an invitation and assurance to the reckless and indifferent; the cause of dread and uncompensated loss; the instrument of uncompensated transfers of the fruits of patient industry. Conceived in the minds of those having little admiration for constitutional government and cherishing distrust of the judiciary, it has run a riotous and mischievous course as a constitutional perversion and

abuse of the jury system, contributing to destroy the certitude of legal administration and the efficiency of the courts as competent remedial agencies. It has prevented the fair administration of justice and sunk the jury system into further disrepute, making the jury a mere irresponsible "two-thirds of twelve", exercising power in the presence of a court which, helplessly holding the scales, is denied the right to adjust the balance.



Attorneys for Plaintiff in Error.

Of Counsel.

PLAINTIFF IN ERROR'S EXHIBIT "A".

OPINION OF THE SUPREME COURT OF THE STATE OF OKLAHOMA.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA, SUPREME COURT COMMISSION, DIVISION NUMBER TWO.

No. 8758.

JACOB M. DICKINSON, Receiver Chicago, R. I. & P. Ry. Company, *Plaintiff in Error*,

vs.

EVA ROBERTS COLE, Administratrix Estate of A. W. Roberts, Deceased, for Herself, and Sarah F. Roberts, Claude Roberts, and Barnum Roberts, *Defendant in Error*.

Syllabus.

1. Art. 23, Sec. 6 of the Const. of Oklahoma is not merely declaratory of the common law, but requires that the defense of contributory negligence and assumption of risk as to questions of fact in all cases whatsoever, shall at all times be left to the jury, and the finding of the jury upon these defenses is conclusive upon the court.

2. The citizen has no property in a defense and while rights which have accrued to him under the operation of existing laws and have thereby become vested, may not be taken away by change of rule, he cannot be heard to complain if the rule is changed before any rights have accrued to him thereunder.

3. The running of a train within the limits of a city, in excess of the rate of speed prohibited by ordinance of the city, is negligence *per se*.

Appeal from the District Court of Oklahoma County; Edward Dewes Oldfield, Judge.

Affirmed.

C. O. Blake, R. J. Roberts, W. H. Moore, and John E. DuMars, for Plaintiff in Error.

Ledbetter, Stuart & Bell, for Defendant in Error.

POPE, C.:

On the morning of December 11, 1915, A. W. Roberts, while attempting to cross the tracks of the Rock Island at the intersection with tracks of the Oklahoma Railway Company in the western part of Oklahoma City, stepped in front of one of the Rock Island eastbound passenger trains, designated as train No. 44, was struck by the engine of the train and was instantly killed. His widow brought suit against the receiver of the Railroad Company, recovering judgment in the District Court of Oklahoma County, and the Receiver brings error.

The uncontradicted evidence shows that the deceased, without anything to obstruct his view of the approaching train for more than a block away, stepped in front of it and was instantly killed. Were it not for Art. 23, Sec. 6, of the State Constitution, which provides this: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury," it would be necessary to hold as a matter of law that the negligence of plaintiff precludes a recovery. The receiver devotes the greater portion of a well prepared brief to the above quoted section of the Con-

stitution; his argnments being that the provision as construed to warrant the submission of the cause to the jury takes from the receiver a vested right in his defense of contributory negligence, and hence is in violation of the 14th Amendment to the Federal Constitution. As said by this Court in the case of *St. L. & S. F. Ry Co.* vs. *Long*, 41 Okla. 190, the above quoted constitutional provision is plain and unambiguous, and plainly makes the question of contributory negligence one for the jury, but in no event would there be any merit in the contention that the constitutional provision takes away a vested right from the receiver, since the facts of which the action is based arose after adoption of the Constitution. This question has been definitely determined by this Court in the case of *Adams against Iten Biscuit Company*, 162 Pac. 938. In this well considered case, in passing upon the question raised in the instant case, the Court said:

"It may be safely stated as a general rule that the citizen has no property in a rule of law, and that, while rights which have accrued to him under the operation of existing laws and have thereby become vested may not be taken away by a change of the rules, he cannot be heard to complain if the rule is changed before any rights have accrued to him thereunder."

We think that the above case conclusively answers the contention of the plaintiff in error that no one has a vested right operative against the change of a law in a cause of action or defense which may accrue to him thereunder in the future. It follows that there is no element of vested right in the instant case. It would be an unreasonable construction and one never given, to hold that the fourteenth amendment of the Federal Constitution is

prohibitive of all change in legal process and methods, and was intended to render all law unchangeable. Of nothing is the law more jealous than of the right to a jury trial and yet it has been held that to take away jury trials where the right has existed is not in violation of the fourteenth amendment. *Walker* v. *Sauvinet*, 92 U. S. 90; *Church* v. *Kilsey*, 121 U. S. 282; *Marvin* v. *Truot*, 199 U. S. 212.

There can certainly be no greater change in the law in which a question is transferred for determination from the jury to the Court. It follows therefore that the plaintiff in error's contention that the court should have held that contributory negligence of the deceased precluded a recovery, cannot be sustained.

The uncontradicted evidence shows that the train was running on acquired momentum, steam cut off and was being controlled by the air brakes; that the automatic bellringer was working, and the whistle was sounded for the crossing. Both the engineer and fireman were keeping a careful lookout, the engineer whose view was obstructed by the boiler could not see the deceased, as he was on the opposite side of the tracks, but he was seen by the fireman. The latter assumed that the deceased would use the care of an ordinarily prudent person and would not attempt to cross the track in front of the train. In this there was no neglect. Elliott on Railroads, Sec. 1153.

The only negligence on the part of the defendant was in the speed of the train, being in excess of the ordinance rate. In this particular only was there a conflict in the evidence, and being controlled by the verdict we must conclude that the train was running at a speed prohibited by ordi-

nance of the city, which constitutes negligence *per se*. For the running of a train at a rate of speed in excess of that allowed by statute or ordinance is negligence *per se*.

We are of the opinion that there was sufficient evidence introduced on behalf of the plaintiff to warrant the jury in returning a verdict for the plaintiff below. The cause is therefore affirmed.

December 24, 1918.

By the Court: Adopted in whole.

PLAINTIFF IN ERROR'S EXHIBIT "B".

IN THE SUPREME COURT OF THE UNITED STATES.

The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error.

vs.

Eva Roberts Cole, Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, and Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Defendant in Error.

ASSIGNMENT OF ERROR.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Oklahoma erred to the grevious injury and wrong of the plaintiff in error herein and to the prejudice and against the substantial rights of the plaintiff in error herein, in the following particulars, to wit:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County, Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in refusing to pass upon the question of law arising upon the facts shown in evidence.

3. The Supreme Court of the State of Oklahoma erred in holding that Sec. 6 of Art. 23 of the Constitution of the State of Oklahoma, providing:

> "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury"

is not repugnant to the Fourteenth Amendment to the Constitution of the United States, in denying the equal protection of the laws.

4. The Supreme Court of the State of Oklahoma erred in holding that the effects of the judgment and proceedings of the District Court of Oklahoma County, Oklahoma, were not to deprive the plaintiff in error of its money and property without due process of law.

5. The Supreme Court of the State of Oklahoma erred in holding that the judgment and proceedings did not have the effect to deny to the plaintiff in error the equal protection of the laws.

6. The Supreme Court of the State of Oklahoma erred in holding that the question of contributory negligence was, by reason of the provisions of Sec. 6 of Art 23 of the Constitution of the State of Oklahoma, a question of fact only.

7. The Supreme Court of the State of Oklahoma erred in giving effect to Sec. 6 of Art. 23 of the Constitution of the State of Oklahoma.

For these and other manifest errors appearing in the ercord, the said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, prays that the judgment of said Supreme Court of the State of Oklahoma be reversed, set aside and held for naught and that judgment be rendered for

plaintiff in error, granting it its right under the Constitution and laws of the United States, and plaintiff in error also prays judgment for its costs.

C. O. BLAKE,

R. J. ROBERTS,

JOHN E. DUMARS,

Attorneys for The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error.

PLAINTIFF IN ERROR'S EXHIBIT "C".

COPY OF ARTICLE 23 OF THE CONSTITUTION OF THE STATE OF OKLAHOMA.

ARTICLE 23

MISCELLANEOUS PROVISIONS.

Section 1. Eight Hours to Constitute a Day's Work on Public Works. Eight hours shall constitute a day's work in all cases of employment by and on behalf of the State or any county or municipality.

Section 2. Convict Labor—Contracting of Prohibited. The contracting of convict labor is hereby prohibited.

Section 3. Child Labor Prohibited. The employment of children, under the age of fifteen years, in any occupation, injurious to health or morals or especially hazardous to life or limb, is hereby prohibited.

Section 4. Labor in Mines—Eight-Hour Day—Children and Women Not Employed. Boys under the age of sixteen years, and women and girls, shall not be employed, underground, in the operation of mines; and, except in cases of emergency, eight hours shall constitute a day's work underground in all mines of the State.

Section 5. Employees of Factories, Mines and Railroads—Health and Safety of. The Legislature

shall pass laws to protect the health and safety of employees in factories, in mines, and on railroads.

Section 6. Contributory Negligence and Assumption of Risk as a Defense for the Jury. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.

Section 7. Right of Action in Case of Death Never to Be Abrogated or Amount of Recovery Limited by Statute. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

Section 8. Contracts Waiving Rights Void. Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution, is sought to be waived, shall be null and void.

Section 9. Void Provisions of Contracts. Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void.

Section 10. No Change in Salary or Emoluments or Extension of Term of Public Officer—Exception. Except wherein otherwise provided in this Constitution, in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office, unless by operation of law enacted prior to

such election or appointment; nor shall the term of any public official be extended beyond the period for which he was elected or appointed: Provided, That all officers within this state shall continue to perform the duties of their offices until their successors shall be duly qualified.

Section 11. Colored Race—Negro—Negro Race —White Race. Wherever in this Constitution and laws of this State, the words "Colored" or "colored race," "negro" or "negro race," are used, the same shall be construed to mean or apply to all persons of African descent. The terms "white race" shall include all other persons.

FILED
DEC 19 1919
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

October Term, 1919

Original File No. 26,929

Chicago, Rock Island & Pacific Railway Company,
Plaintiff in Error,
vs.
Eva Roberts Cole, as administratrix of the Estate of A. W. Roberts, Deceased, for herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts,
Defendant in Error.

No. 290

In Error to Supreme Court of State of Oklahoma.

DEFENDANT IN ERROR'S MOTION TO DISMISS OR AFFIRM, AND BRIEF AND ARGUMENT.

W. A. LEDBETTER,
H. L. STUART,
R. R. BELL,
E. P. LEDBETTER,

Oklahoma Law Brief Company, 119½ West First Street, Oklahoma City

SUPREME COURT OF THE UNITED STATES

October Term, 1919

Original File No. 26,929

Chicago, Rock Island & Pacific Railway Company, *Plaintiff in Error,* vs. Eva Roberts Cole, as administratrix of the Estate of A. W. Roberts, Deceased, for herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, *Defendant in Error.*	No.

In Error to Supreme Court of State of Oklahoma.

DEFENDANT IN ERROR'S MOTION TO DISMISS OR AFFIRM, AND BRIEF AND ARGUMENT.

STATEMENT OF THE NATURE AND RESULT OF CASE.

(Figures in parentheses refer to pages of printed record.)

This is a writ of error to review the judgment of the Supreme Court of the State of Oklahoma, af-

firming a judgment of defendant in error obtained against Jacob M. Dickinson, Receiver of plaintiff in error, the opinion of the Supreme Court of the State of Oklahoma being reported under style of *Dickinson* v. *Cole*, 177 Pac. 570, and not yet officially reported.

This suit was brought in the District Court of Oklahoma County, Oklahoma, on March 15th, 1916, by defedant in error, as administrator of estate of A. W. Roberts, deceased, to recover of Jacob M. Dickinson, Receiver of Chicago, Rock Island & Pacific Railway Company, three thousand dollars, damages on account of the death of said A. W. Roberts, deceased, having been caused by negligence of employees of said Receiver in operating one of said Receiver's engines (14-17).

The answer of said Receiver consisted of a general denial with some admissions excepted, and a plea of contributory negligence on part of said A. W. Roberts, deceased (17-18).

Reply of defendant in error consisted f a denial of allegations of contributory negligence on part of A. W. Roberts, deceased (18-19).

On verdict of jury in favor of defendant in error in said District Court for one thousand dollars (136), judgment was rendered in favor of defendant in

error against said Receiver for one thousand dollars and interest (138-139).

On appeal from said judgment to Supreme Court of Oklahoma, Chicago, Rock Island & Pacific Railway Company, on its written application (146-147), was substituted as plaintiff in error in lieu of Jacob M. Dickinson, Receiver (147).

On December 23, 1918, Supreme Court of Oklahoma affirmed said judgment of said District Court (148). In its opinion affirming said judgment Supreme Court of Oklahoma held that the provision of Art. 23, Sec. 6 of the Oklahoma Constitution, which provides: "That the defense of contributory negligence or of assumption of risk, shall in all cases whatsoever be a question of fact, and shall at all times be left to the jury," did not violate the Fourteenth Amendment of the Federal Constitution (148-150).

An order granting writ of error to the Supreme Court of the United States was made by J. F. Sharp, Chief Justice of the Supreme Court of Oklahoma, on January 6, 1919 (7), and the appeal was lodged in this court on February 11, 1919 (151).

In the Supreme Court of the United States, October Term, 1919.

ORIGINAL FILE NO. 26,929.

No. .....October Term, 1919.

The Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error, v. Eva Roberts Cole, as administratrix of the Estate of A. W. Roberts, Deceased, for herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Defendant in Error.

MOTION TO DISMISS OR AFFIRM.

Now comes Eva Roberts Cole, as administratrix of the estate of A. W. Roberts, deceased, for herself, Sarah F. Roberts, Claude Roberts and Barnum Roberts, defendant in error, and respectfully moves the court to dismiss this appeal or affirm the judgment of the Supreme Court of Oklahoma, from which this writ of error has been prosecuted, for the following reasons:

(1) It is manifest from the record in this cause that writ of error in this cause was taken for delay only.

(2) The federal questions raised in the assignment of errors of plaintiff in error have all been decided adversely to the contentions of plaintiff in error, and said contentions are now frivolous.

W. A. LEDBETTER,
H. L. STUART,
R. R. BELL,
E. P. LEDBETTER,

Counsel for Eva Roberts Cole, as Administratrix of the Estate of A. W. Roberts, Deceased, for herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts, Defendant in Error.

BRIEF AND ARGUMENT.

The first assignment of error of plaintiff in error, to-wit: "The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County, Oklahoma" (5-6) is insufficient to present a federal question, and does not comply with the provisions of subdivision 2 of Rule 21 of this Court.

The question or questions presented in asignment of errors two to seven (6), claiming that the decision of the Supreme Court of Oklahoma in this case is repugnant to the Fourteenth Amendment of the Constitution of the United States have ben definitely settled by this court adversely to the contentions of plaintiff in error.

The last and final word on this issue has been spoken by this court in its decision rendered on June 19, 1919, in the following cases:

Arizona Copper Company v. *Joseph B. Hamer*, No. 20.
Arizona Copper Company v. *Richard Bray*, No. 21.
Ray Consolidated Copper Company v. *Dan Veazey*, No. 232.
Inspiration Consolidated Copper Company v. *Ceferino Mendez*, No. 332.
Superior & Pittsburg Copper Company v. *Frank Tomach*, No. 334 (250 U. S. —).

In next to the last paragraph of the opinion of the court in these cases it is said: "But it is thoroughly settled by our previous decisions that a state may abolish contributory negligence as a defense."

If a state can abolish contributory negligence as a defense, it certainly has the power to declare that the defense of contributory negligence shall be one of fact to be determined by the jury.

In *Bowersock* v. *Smith*, 243 U. S. 29 to 35, 61 Law Ed. 572, the constitutionality of the statute of Kansas, Kansas Laws 1903, Chap. 356, providing that in an action brought under such statute, the doctrines of contributory negligence, assumption of risk and fellow servant, shall not bar recovery, and that the burden of proof shall be upon the defendant, was upheld.

Said statute was held not to deny the rights guaranteed by the Fourteenth Amendment, and a number of previous decisions of this court sustaining this holding are cited at page 34 of 243 U. S.

In *Chicago & Alton Railroad Company* v. *Tranberger*, 238 U. S. 67 to 78, 59 Law Ed. 1204, it was contended that a statute of the state of Missouri requiring the construction and maintenance of openings across the right-of-way and roadbeds of rail-

roads for the carrying off of water and fixing a liability for damages done by failure to comply with said statute, violated the *ex-post facto* provision of the Constitution and was repugnant to the "due process" and "equal protection" provisions of the Fourteenth Amendment.

At pages 76 and 77 of 238 U. S. in its opinion in that case this court says:

> "It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 558, 58 L. Ed. 712, 726, 34 Sup. Ct. Rep. 364, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 292, 43 L. Ed. 702, 704, 19 Sup. Ct. Rep. 465; *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Bacon* v. *Walker*, 204 U. S. 311, 317, 51 L. Ed. 499, 502, 27 Sup. Ct. Rep. 289."

In *New York Central R. R. Co.* v. White, 243 U.

S. 188, 61 Law Ed. 667, the provisions of compulsory compensation scheme of the New York Workman's Compensation Act fixing certain liability upon employers for disabling or fatal accidental personal injuries received by employees while pursuing certain occupations without regard to fault as a cause, except where injury or death was occasioned by the employee's willful intention to produce it, or where the injury resulted solely from the employee's intoxication while on duty, were held not to contravene the Fourteenth Amendment.

This court has held that the denial of trial by jury is not inconsistent with "due process." *New York Central R. Co.* v. *White*, 243 U. S. 207-208, and cases there cited.

In *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211 to 220, 60 Law Ed. 961, and *St. Louis & S. F. R. Co.* v. *Brown*, 241 U. S. 223 to 228, 60 Law Ed. 966, it was held by this court that the state laws providing for the rendition of verdicts in trials by jury concurred in by less than twelve of the jurors, did not contravene the requirement of the Seventh Amendment, and could be followed in cases brought in the state courts arising under the Federal Employers' Liability Act.

W. A. LEDBETTER,
H. L. STUART,
R. R. BELL,
E. P. LEDBETTER,

Counsel for Eva Roberts Cole, as Administratrix of the Estate of A. W. Roberts, Deceased, for herself, Sarah F. Roberts, Claude Roberts and Barnum Roberts, Defendant in Error.